88- 1816

No. 88-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CITY OF BURLINGTON, VERMONT,
Petitioners,

v.

MOUNTAIN CABLE COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT

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May 10, 1989

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QUESTIONS PRESENTED

1. Whether the Vermont Supreme Court erred in holding that the City of Burlington, Vermont is a "franchising authority" within the meaning of the Cable Television Communications Policy Act of 1984 ("the Cable Act"), and thereby erred in holding that a 1985 settlement agreement between Burlington and Mountain Cable Company limiting rate increases for basic cable television service was preempted by the Act.

2. Whether the Vermont Supreme Court erred in not holding that the protections against Cable T.V. rate regulation found at 47 U.S.C. § 543 can be knowingly and voluntarily waived by a cable television operator, and were so waived by Mountain Cable Company in its settlement agreement with the City of Burlington, Vermont.

PARTIES TO THE PROCEEDINGS

1. The only parties to the proceedings are those found in the caption.

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CITY OF BURLINGTON, VERMONT,
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v.

MOUNTAIN CABLE COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT

The City of Burlington, Vermont respectfully petitions for a Writ of Certiorari to review the judgment of the Vermont Supreme Court entered on November 10, 1988, request for reargument denied February 16, 1989, in Case No. 87-156. This case seeks enforcement by the City of Burlington, Vermont of a 1985 settlement agreement entered into with Mountain Cable Company limiting annual increases in basic cable television rates within the City of Burlington, Vermont.

OPINION BELOW

The opinion of the Vermont Supreme Court in *City of Burlington v. Mountain Cable Company*, No. 87-156 is reported at —— Vt. ——, —— A.2d —— (1988). A copy of the opinion appears in the Appendix (herein referred to as "App. ——") at 1a-9a.

JURISDICTION

The judgment of the Vermont Supreme Court was entered on November 10, 1988. A timely Motion for Reargument was denied on February 16, 1989. This Petition for a Writ of Certiorari is being filed within 90 days of that date pursuant to 28 U.S.C. § 2101(c) (1982) and Rules 20.2 and 20.4 of this Court. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(c) (1982).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are set forth in the Appendix:

1. The Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.*

2. 30 Vermont Statutes Annotated Chap. 13 §§ 501 through 508 inclusive.

3. Charter of the City of Burlington, Vermont Act No. 298 Acts of 1949, § 48XL.

STATEMENT OF THE CASE

The City of Burlington, Vermont ("City") appeals from the denial of its action to enjoin Mountain Cable Company ("Mountain") from increasing its basic cable television rates in the City of Burlington by any amount prior to December 29, 1987, and only within the limitations of Paragraph 4.03 of its June, 1985 Agreement with Burlington.

The City has enjoyed cable television service since the early 1950's. In 1985 Mountain's predecessor-in-interest, TeleSystems, Inc., requested permission from the Vermont Public Service Board to replace the old 12 channel system with a state-of-the-art 54 channel system.

Burlington intervened before the Vermont Public Service Board requesting consideration of competing ap-

plications prior to the construction of this new system. Burlington submitted its own application to the Vermont Public Service Board for a 60 channel municipally owned and operated system.

During pendancy of these matters, TeleSystems and Mountain then requested approval from the Vermont Public Service Board for the sale of TeleSystems to Mountain, which Burlington also initially opposed.

In June of 1985, the City and Mountain entered into a comprehensive settlement agreement resolving these issues.[1] Under the terms of this agreement, Burlington withdrew its application for a Certificate of Public Good from the Vermont Public Service Board to operate a municipal cable television system, agreed to forbear from seeking such a Certificate in the future, agreed to withdraw its objections to the reconstruction of the cable system by Mountain, and agreed to give its active support in the Public Service Board proceedings for ap-

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[1] *Tariff filing of TeleSystems, Inc. d/b/a Cox Cable Green Mountain,* Public Service Board Docket No. 4853; Vermont Supreme Court Docket No. 85-110; *In re Application of the City of Burlington for a Certificate of Public Good to Operate a Cable Television System,* P.S.B. Docket No. 4953; *Petition of TeleSystems Corp. under 30 V.S.A. § 109 for a Certificate of Consent to Sell All of Its Assets Located in Vermont to Mountain Cable Co.; Petition of Mountain Cable Co. under 30 V.S.A. § 231, 503 for a Certificate of Public Good to Own, Maintain and Operate Said Assets, and under 30 V.S.A. § 232 to Mortgage or Pledge Its Property and to Issue Notes or other evidence of indebtedness*; and *Petition of Mountain Cable Corp. under 30 V.S.A. § 102, 503 for a Certificate of General Good to Own, Maintain and Operate Cable Television Systems in Vermont,* P.S.B. Docket No. 4980, Vermont Supreme Court Docket No. 85-366.

This contract also settled actions brought by Mountain's predecessor-in-interest, TeleSystems, contesting an ordinance imposing a $10.30 per square foot street excavation fee by Burlington on all persons who dig in the city streets. *TeleSystems v. City of Burlington* and *TeleSystems v. James Ogden, Burlington Superintendent of Streets,* Chittenden Superior Court Docket Nos. S327-84CnC and S440-84CnC.

proval for reconstruction of the system, which Mountain later obtained.

In consideration of this forbearance by the City, Mountain agreed *inter alia* to limit the annual increase in its basic cable service rates to the greater of i) 5%; ii) the annual rate of inflation in Burlington; or iii) the annual percentage increase in Mountain's cost of providing basic cable television service in Burlington.

In November of 1986 Mountain informed Burlington of its intent to raise basic cable television rates within the City from $10.50 to $12.50 per month. In December of 1986 Burlington filed for an injunction in the Chittenden County Superior Court alleging that its agreement with Mountain barred any increase in basic rates prior to December 29, 1987. The Trial Court *sua sponte* ruled that the applicable provisions of the Burlington-Mountain Agreement were preempted by the Cable Communications Policy Act of 1984 (the Cable Act), and dismissed Burlington's action.

On appeal Burlington argued that the Cable Act does not preclude enforcement of the contract because the Vermont Public Service Board rather than Burlington is the cable television "franchising authority" within Vermont.

For its part, Mountain did not brief or argue that its agreement with Burlington was preempted; to the contrary, in oral argument before the Vermont Supreme Court Mountain's counsel stated that the company considered the agreement a matter freely entered into, which was fair, enforceable, and one the company was willing to stand by.

Nevertheless, the Vermont Supreme Court held that Burlington is a "franchising authority" within the meaning of the Cable Act. It reasoned that although only the Vermont Public Service Board is the franchising authority in the State empowered to grant certificates of public

good for, and to otherwise regulate, cable television systems under 30 Vermont Statutes Annotated Chapter 13, Burlington is a "franchising authority" because the City's Charter empowers it to set terms and conditions and to charge fees for the erection and maintenance of poles, wires, and other apparatus in or under its streets. Act No. 298, Acts of 1949 § 48XL.

In motions for reargument the Vermont Public Service Board filed an amicus memorandum urging the Vermont Supreme Court to reconsider its holding that Burlington is a franchising authority within the meaning of the Cable Act. Burlington urged that the Vermont Supreme Court cited but had overlooked the holdings of *Erie Telecommunications, Inc. v. City of Erie*, 659 F.Supp. 580 (W.D.Pa. 1987), 853 F.2d 1084 (3rd Circuit, 1988) that federal statutory and constitutional rights inuring to the benefit of cable operators may be subject to a knowing and voluntary waiver in a contract. The Vermont Supreme Court denied these motions on February 16, 1989.

REASONS FOR GRANTING THE PETITION

I. Certiorari Should Be Granted to Decide Whether Municipalities Are "Franchising Authorities" Under the Cable Act in States Such as Vermont Where Grant of Service Territories and Other Powers Associated With Cable Television Franchising Are Exclusively Vested With the State Public Service Board.

The holding by the Vermont Supreme Court that the settlement agreement between Burlington and Mountain is preempted by the Act because Burlington is a "franchising authority" presents an important federal question which has not been but should be settled by this Court. (Rule 17(c)) This is *not* a claim that was raised by Mountain. Because it was raised *sua sponte* by the state courts, Burlington has been heretofore deprived of the opportunity to have this question of federal law reviewed in any federal forum.

The Cable Communications Policy Act of 1984 prohibits rate regulation by the cable television franchising authorities in the respective states. The provision for deregulation is found at § 623(a) of the Cable Act codified at 47 U.S.C. § 543. This deregulation was directed expressly at attempts to impose rate regulation in exchange for grant of permission to a cable television operator to do business in a service area.

This is explicitly set forth in the official legislative history *U.S. Code and Administrative News*, 98th Congress, Second Session, 1984 Vol. 5 pp. 4702-4705. This legislation was aimed at the very type of cable television rate regulation formerly exercised by the Vermont Public Service Board under 30 V.S.A. § 504, or at the type of power exercised by municipal franchise authorities whereby consent to rate regulation was given in exchange for the award of permission to provide cable television service to a community.

A. *In 1969 Burlington lost any authority to grant cable television franchises to do business in the City.*

The Cable Act preemption does not apply to the City of Burlington. In 1969, the Vermont Legislature exclusively authorized the Vermont Public Service Board to franchise and regulate cable television in the state. The structure paralleled that for public utilities, requiring the issuance of a Certificate of Public Good before a cable television system could be constructed, owned or operated. 30 V.S.A. §§ 502, 503 (as added in 1969, No. 167 (Adjourned Session)).

It was clear that this Act preempted any jurisdiction that a municipality might previously have enjoyed to franchise or regulate a cable system operating within its borders.[2] In October of 1952, Burlington had granted

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[2] The Vermont Court had held in *Rutland Cable Television, Inc. v. City of Rutland*, 122 Vt. 162, 166 A.2d 191 (1960) that municipalities were limited under general state statutes to examining

a cable television franchise to Green Mountain Television, Inc. under authority of its City Charter (Act. No. 298, Acts of 1949, § 48XL). As a consequence of the 1969 Act, Burlington lost whatever power it had to authorize future cable systems to do business in the City, though it retained in this section of the City Charter the power to impose terms and conditions for use of city streets including charges for the erection and maintenance of poles, wire, and buried apparatus.

For nearly 20 years, the Vermont Public Service Board's exclusive jurisdiction over cable television franchises has been unchallenged. From 1970 to the present it has had exclusive and comprehensive jurisdiction over the franchising, operation and regulation of cable systems in Vermont, including rates. The State's municipalities such as Burlington could participate in the franchising and regulation of cable systems only as non-statutory intervenors pursuant to the Vermont Public Service Board's general procedural rules.

B. ***The Agreement is the product of competition between Burlington and Mountain for award of the cable television franchise from the Vermont Public Service Board to serve Burlington.***

In the present case, the question regarding construction of a new cable television system in Burlington, consideration of Burlington's application for a municipality owned and operated system, and certification of Mountain as TeleSystems' successor cable operator in Burlington were all before the Vermont Public Service Board exclusively. Burlington appeared before the Board as an intervenor, and in the case of its own proposal for a municipal system, as an applicant.

The agreement between Burlington and Mountain was not an agreement between franchisor and franchisee.

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whether an applicant's apparatus would interfere with the public travel or convenient use of the street, and that such statutes could not be used to grant any privilege to provide service in a community.

Rather, it was an agreement of settlement and compromise voluntarily entered into by two franchisees competing to obtain from the Vermont Public Service Board permission to provide cable service within the limits of the City of Burlington.

Mountain's competitor was not a private corporation but a municipality with a long and successful record of operating water and electric systems. In exchange for Burlington's perpetual forbearance from pursuing that competition and for enlisting Burlington's support for Mountain's application before the Vermont Service Board, Mountain agreed to certain constraints on its ability to raise basic service rates in Burlington.

C. *The Agreement does not invoke police or other regulatory powers of municipal government.*

Stated differently, Burlington's bargain retained some of the proprietary rights over basic cable service rates that it would have exercised as the operator of a municipal cable television system. Nowhere did this agreement authorize Burlington to establish a city board or commission to regulate Mountain cable rates, nor did it attempt to stipulate to continuing rate regulation by the Vermont Public Service Board after the effective date of the Cable Act. Instead, Burlington has a limited contract right constraining increases in basic rates. Regulatory review of rates is not automatically involved. Burlington must sue in an action for breach of contract and can prevail only if it proves that an increase in basic rates by Mountain constitutes a breach. Such a breach is remedied in the same manner as contracts are generally construed and enforced—with the right to a jury trial—as was demanded in Burlington's initial pleadings.

That the City of Burlington is a unit of local government does not necessarily mean that its Agreement with Mountain involves the exercise of governmental powers. That the municipalities in the majority of other states

exercise powers as cable television franchising authorities does not mean that Burlington is a franchising authority simply because it too is a municipality.

II. Certiorari Should Be Granted to Settle Whether Protections Under Federal Law Inuring to the Benefit of Cable T.V. Operators Can Be Knowingly and Voluntarily Waived.

A. The Vermont Supreme Court is in direct conflict with the holding of the Third Circuit Court of Appeals regarding waiver.

The Vermont Supreme Court's opinion cited *Erie Telecommunications v. City of Erie*, 659 F.Supp. 580 (W.D. Pa. 1987) for the proposition that the exaction of a fee in exchange for the use of a public street is a "franchise." Yet the Vermont Court ignored the holdings of both the U.S. District Court and of the Third Circuit Court of Appeals at 853 F.2d 1084 (1988), that protections inuring to the benefit of cable operators under both federal statute and the U.S. Constitution may be voluntarily relinquished by knowing and voluntary waiver in a contract—even in contracts with the franchising authority. The *Erie* decision is recent and authoritative federal case law construing the rights of cable operators under Federal law.

The U.S. District Court ruled that provisions of 47 C.F.R. § 7631 (1980) under which the F.C.C. limited franchise fees to 3% of gross revenues, and to 5% under § 622 of the 1984 Cable Act, could and had been voluntarily relinquished when the record "convincingly demonstrates" that the operator and its representatives were knowledgeable participants in franchise negotiations, were cognizant of the statutory limitations being waived, and had received benefit and advantage from these waivers and could show no duress to make offers of franchise fees in excess of statutory limitations.

The Court of Appeals affirmed this decision further elaborating also on the question of waiver of constitu-

tional rights. Citing *D.H. Overmeyer v. Frick Co.*, 405 U.S. 174 (1972); *Fuentes v. Shevin*, 407 U.S. 67 (1972) the Third Circuit Court of Appeals held that a valid waiver of rights had been shown where the cable operator had wide spread commercial experience, had equal bargaining power with the franchising authority, had the advice of competent counsel as to the significance of the rights it was waiving, and where it enjoyed a substantial benefit from the agreement by conclusively terminating the prospect of competition. 853 F.2d at 1095-1097.

The present facts present an even more compelling case of waiver than the *Erie* decisions:

—Here Mountain has stood by its agreement with Burlington stating it is fair and enforceable. Unlike ETI, Mountain has not claimed it acted under duress.

—Mountain and Burlington had equal bargaining power.

—The text of the agreement shows that Mountain was fully aware of the rights under the Cable Act of 1984 and consciously gave them up as bargain for consideration in order to obtain withdrawal of Burlington's application for a municipal cable television system, and to enlist Burlington's support of Mountain's system.

—Mountain has "become the sole cable operator in the city as a result of a protracted and complex . . . process" and would by the Vermont Court's holding be allowed "to withdraw from performing its obligations and from discharging its burdens, while it still continues to retain all the benefits it received from the City as a result of these agreements." *Erie, supra*, 853 F.2d at 1097.

B. *Mountain never claimed any protections from the Cable Act.*

Public policy is no more affronted by the waiver of protections found in the Cable Act than it would be when a criminal defendant makes a knowing and voluntary

waiver of constitutional rights in a criminal proceeding or by knowing and voluntary waiver of rights by parties in a commercial contract. The statutory provisions limiting franchise fees and rate regulation in the 1984 Cable Act were designed for the protection and the benefit of the cable operator. *Mountain never sought such protection.*[3]

The invalidation of this portion of the agreement between Burlington and Mountain was entirely gratuitous. It vindicates no federal policy and makes no common sense.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari from the Supreme Court of the State of Vermont should be granted.

Respectfully submitted,

CITY OF BURLINGTON, VERMONT

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May 10, 1989

[3] There was no ripe case or controversy between the parties Burlington and Mountain as to the validity of their agreement. The real dispute here has been between the state judiciary, acting *sua sponte*, and Burlington. This conflicts with the Vermont Court's own previous holdings that the judicial power conferred by the Vermont Constitution cannot "be enlarged to include the giving of an opinion upon a question of law not involved in actual and bona fide litigation." *In re Constitutionality of House Bill, 88,* 115 Vt. 524, 64 A.2d 169 (1949).

APPENDIX

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APPENDIX

IN THE SUPREME COURT
OF THE STATE OF VERMONT

November Term, 1987

No. 87-156

CITY OF BURLINGTON

v.

MOUNTAIN CABLE COMPANY

Supreme Court

On Appeal From Chittenden Superior Court

Matthew I. Katz, J.

[Filed Nov. 10, 1988]

John L. Franco, Jr., Assistant City Attorney, Burlington, for plaintiff-appellant

Leo A. Bisson, Jr., of Downs Rachlin & Martin, St. Johnsbury, for defendant-appellee

William E. Wargo, City Attorney, Winooski, for proposed-intervenor cross-appellant

Present: Allen, C.J., Peck, Gibson and Mahady, JJ., and Keyser, J. (Ret.), Specially Assigned

ALLEN, C.J. The City of Burlington (City) appeals from the denial of its motion to enjoin Mountain Cable Company (Mountain) from increasing its basic cable television service rates prior to December 29, 1987. We affirm.

In June of 1985, the City and Mountain entered into a contract regarding the provision of cable television service to Burlington residents. Under the terms of the agreement, the City withdrew its objections then pending before the Public Service Board to the reconstruction of the cable system by Mountain, withdrew its opposition to the sale of the franchise rights of Mountain's predecessor to Mountain and agreed to give its active support to the reconstruction of the system by Mountain. It further agreed to withdraw its application for a certificate from the Public Service Board to operate a municipal television system, to forbear from seeking such a certificate in the future, and to drop all claims to the franchise rights being transferred from Mountain's predecessor to Mountain. The parties agreed that the contract constituted a settlement and compromise of all pending matters between the City, Mountain, and Mountain's predecessor. Pursuant to the settlement, litigation then pending between the parties was dismissed and objections by the City to proposed actions by Mountain then pending before the Public Service Board were withdrawn.

The instant dispute arose over the construction of a provision in the agreement which limits Mountain's right to raise rates for basic cable service in the City. Mountain informed the City of its intention to raise the basic cable rates as of January 1, 1987. The City then instituted this action seeking to prohibit the increase, contending that under the agreement Mountain could not raise its basic rates until December 29, 1987.

At the hearing on the motion for preliminary and permanent injunction, the trial court, *sua sponte*, ques-

tioned whether the paragraph in dispute had been preempted by the Cable Television Communications Policy Act of 1984 (Act). In a subsequent decision the trial court concluded that the attempt to regulate rates was illegal and denied the motion for a preliminary injunction.

On appeal, the City argues that the Act does not preclude enforcement of the contract because it only prohibits rate regulation by franchising authorities, and the State, rather than the City, is the franchising authority.

We note at the outset that the issue of illegality was not pleaded or raised by Mountain, and that Mountain neither briefed nor argued this issue at hearing or in this Court.[1] Courts, however, are not at liberty to ignore illegal provisions in contracts even though the parties have agreed not to contest the contract on grounds of illegality. While, normally, illegality must be pleaded, V.R.C.P. 8(c), if of a serious nature, a court of its own motion will take notice of it and deny relief. See *Vermont Department of Public Service v. Massachusetts Municipal Wholesale Electric Co.*, No. 86-555, slip op. at 22 (Vt. Sept. 27, 1988); see also *Rathke v. Yakima Valley Grape Growers Ass'n*, 30 Wash. 2d 486, 192 P.2d 349 (1948) (trial court justified in dismissing action where sales agreement on its face was illegal and in violation of federal statute).

The Act was promulgated with an effective date of October 30, 1984. Its purposes were, inter alia, to:

> (1) establish a national policy concerning cable communications;
>
> . . .

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[1] The parties to the contract agreed not to initiate any collateral attack on the contract or any of its provisions by any action in any court or tribunal. Presumably, Mountain's failure to claim illegality as a defense was to avoid being in breach of this portion of its agreement.

(3) establish guidelines for the exercise of Federal, State and local authority with respect to the regulation of cable systems;

. . .

(6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

47 U.S.C. § 521.

With respect to rate regulation the Act provides:

(a) Any Federal agency or State may not regulate the rates for the provision of cable service except to the extent provided under this section. Any franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section.

. . . .

(c) In the case of any cable system for which a franchise has been granted on or before the effective date of this title, until the end of the 2-year period beginning on such effective date, the franchising authority may, to the extent provided in a franchise—

(1) regulate the rates for the provision of basic cable service, including multiple tiers of basic cable service;

(2) require ~~the~~ provision of any service tier provided without charge (disregarding any installation or rental charge for equipment necessary for receipt of such tier); or

(3) regulate rates for the initial installation or the rental of 1 set of the minimum equipment

> which is necessary for the subscriber's receipt of basic cable service.

47 U.S.C. § 543.

A "State" under the Act "means any State, or political subdivision, or agency thereof." 47 U.S.C. § 522(15). The City is such a subdivision and may not regulate except as authorized by the Act. The exceptions are limited and it is not claimed that any apply to the facts of this case.

The City's argument that the Act prohibits only "franchising authorities" from rate regulation overlooks the plain language of the Act, which prohibits rate regulation by a political subdivision. The language in the disputed paragraph of the contract regulates the rates which Mountain may charge during the term of the contract. It prohibits any increase by more than the greater of: i) 5%, ii) the annual rate of inflation in Burlington, or iii) the annual percentage of increase in Mountain's costs. That the regulation is contained in a contract for good and valuable considerations is immaterial.[2] The attempt to enforce the provisions of the paragraph is an attempt to regulate, and this the Act forbids.

The City argues that the legislative history of the Act supports its argument that it is intended only to prohibit the regulation of subscription rates by franchising authorities. 1984 U.S. Code & Admin. News 4702-4705. That portion of the history to which our attention is directed simply indicates that the section dealing with regulation of rates is intended to establish a uniform policy of regulation where regulation is still permitted by franchising authorities. It does not suggest that the

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[2] The City concedes that, in exercising its constitutional powers, Congress may impair obligations arising under contracts.

prohibition against basic rate regulation is directed against franchising authorities only.

The legislative history and the language of the Act evidence the declared policy of Congress to prohibit local governments from regulating basic cable rates after two years from the effective date of the Act. Refusal to enforce an agreement permitting rate regulation is consistent with and essential to effectuate this policy. Enforcement would offend one of the essential purposes of the Act. See *United States v. Mississippi Valley Co.*, 364 U.S. 520, 563 (1961). A term of an agreement is unenforceable if the interest in its enforcement is clearly outweighed by a public policy against the enforcement. See *id.* Here, the stated policy is clear and unequivocal, and the enforcement of the contract provision would undermine and detract from that policy.

Even were we to accept the City's argument that the Act forbids rate regulation only by franchising authorities, the result would not change. A "franchising authority" as defined in the Act is "any governmental entity empowered by Federal, State, or local law to grant a franchise; . . . ." 47 U.S.C. § 522(9). A "franchise" means an "initial authorization, or renewal thereof . . . issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement or otherwise, which authorizes the construction or operation of a cable system." 47 U.S.C. § 522(8). While the City may be correct in arguing that the Public Service Board is a franchising authority here,[3] the City is also a franchising authority within the meaning of the Act. Congress recognized that in many states there might be more than one franchising authority and clearly intended that any and

[3] Under the Vermont Cable Television Reform Act of 1988, the Public Service Board is the franchising authority in the state empowered to grant certificates of public good for cable systems. 30 V.S.A. § 502(b).

all would be covered by the provisions of the Act. In the legislative history, it was noted that in several states the franchising process includes approval by a State agency as well as local government. It was intended in such cases that the term "franchising authority" would include the State agencies as well as "any local government body with authority to grant a franchise. . . ." 1984 U.S. Code & Admin. News, at 4682. The City's charter empowers it to grant franchises for the use of its streets by a cable company and to charge fees for the erection and maintenance of poles and wires in or under its streets. See 1949, No. 298, § 48. Under the terms of the agreement, Mountain paid—and the City accepted—a sum of money for the use and occupation of its streets "within the meaning of Charter § 48 (XL) and agreed that the payment was "in lieu of any Franchise Fee that might otherwise be payable . . . ." The agreement further provided for pole attachment agreements, the rentals to be paid therefor, and the burying of cable within the streets of the City. The exaction of a fee in exchange for use of the public streets is a franchise. See *Erie Telecommunications, Inc. v. City of Erie*, 659 F. Supp. 580, 597 (W.D. Pa. 1987). The City was a governmental authority empowered by State law to grant a franchise within the meaning of the Act and is therefore a "franchising authority." It may regulate only to the limit of the authority granted in the Act, and the Act clearly preempts any provision of the franchise that is inconsistent with it:

> [A]ny provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded.

42 U.S.C. § 556(c). Here, the contract was an authorization for the construction and operation of a cable system,

and the City was a franchising authority.[4] The contractual provisions regulating rates were contrary to and preempted by the Act and may not be enforced.

In view of our disposition of this matter, we affirm the denial of the City of Winooski's motion to intervene.

Affirmed.

FOR THE COURT:

/s/ Frederic W. Allen
Chief Justice

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[4] Because the City was acting in the capacity of a market competitor in obtaining the settlement contract, it now characterizes its rights under agreement as proprietary rather than regulatory. But the City cannot avoid the Act's clear prohibitions of regulation by arguing that it achieved rate control only through "proprietary" means. Otherwise, governmental subdivisions could use threats of market competition to obtain de facto rate regulation through contractual settlements, thus avoiding the dictates of the Act.

IN THE SUPREME COURT
OF THE STATE OF VERMONT
November Term, 1987

Supreme Court Docket No. 87-156

CITY OF BURLINGTON

v.

MOUNTAIN CABLE COMPANY

Appealed from Chittenden Superior Court
Docket No. S1190-86CnC

ENTRY ORDER

[Filed Nov. 10, 1988]

In the above entitled cause the Clerk will enter:

Affirmed.

FOR THE COURT:

/s/ Frederic W. Allen
FREDRIC W. ALLEN
Chief Justice

Concurring:

/s/ Louis P. Peck
LOUIS P. PECK
Associate Justice

/s/ Ernest W. Gibson III
ERNEST W. GIBSON III
Associate Justice

/s/ Frank G. Mahady
FRANK G. MAHADY
Associate Justice

/s/ F. Ray Keyser
F. RAY KEYSER
Associate Justice (Ret.)
Specially Assigned

IN THE SUPREME COURT
OF THE STATE OF VERMONT

Supreme Court Docket No. 87-156

CITY OF BURLINGTON

v.

MOUNTAIN CABLE COMPANY

MOTION FOR REARGUMENT

Appellant City of Burlington moves for reargument of the above-captioned matter pursuant to V.R.A.P. § 40. Appellant submits that the Court's opinion of November 10, 1988 misapprehends the points of law cited in *Erie Telecommunications, Inc. v. City of Erie*, 659 F.Supp. 580 (W.D.Pa. 1987) and overlooked the authority of *Erie Telecommunications, Inc. v. City of Erie*, 853 F.2d 1084 (3rd Cir., 1988). Both authorities were appended to Appellant's Brief under V.R.A.P. § 28(i) as supplemental authorities.[1]

MEMORANDUM IN SUPPORT OF REARGUMENT

Introduction

The opinion of the Court of November 10, 1988 rejected Burlington's contention that the City was not a "franchising authority" within the meaning of the Cable

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[1] As supplemental authorities, they were referenced by letter without briefing or argument. This Court of Appeals decision was incorrectly cited as being in Vol. 850 of the Federal Reporter, when it ultimately appeared in Volume 853. The advance sheet of the opinion was submitted with the letter.

Communications Policy Act of 1984. Citing *Erie Telecommunications, Inc. v. City of Erie*, 659 F.Supp. 580, 597 (W.D.Pa. 1987) for the proposition that the exaction of a fee in exchange for the use of public streets is a franchise. The Court held that Burlington's receipt of money from Mountain Cable Company for the use of city streets makes it a franchising co-authority in a local-state relationship with the Vermont Public Service Board.

Having decided that Burlington is a franchising authority subject to the Cable Act, the Court's opinion nevertheless misapprehended and overlooked the following points of law contained in both of the *Erie* decisions regarding contracts between cable companies and franchising authorities:

1) Federal statutory rights designed to protect the cable operator may be waived.

2) Where essential terms of a contract are involved, there can be no partial rescission of the contract by the court.

The *Erie* decisions are the most recent and authoritative Federal caselaw construing the rights of cable operators under 1984 Cable Act.

1. *A Cable Operator May Knowingly and Vountarily Waive Federal Statutory Rights in A Contract with A Franchise Authority.*

Implicit in this Court's November 10 opinion is that protections and rights existing in the 1984 Cable Act cannot be waived by the cable operator. There is no current Federal caselaw which holds that such rights cannot be waived. Both the trial and appellate court decisions in the *Erie* hold that a cable operator may in a contract with a franchising authority waive rights under both the 1984 Cable Act and constitutional law if that waiver is made knowingly and voluntarily.

The U.S. District Court for the Western District of Pennsylvania ruled that provisions of 47 C.F.R. § 76.31 (1980) under which the F.C.C. limited franchise fees to 3% of gross revenues, and the 5% franchise fee limitation under § 622 of the 1984 Cable Act, could be and had been "vountarily relinquished."

> . . . Here, the Court concludes that, unlike ETI's constitutional challenges, the statutory claims involve a circumstance where a known right has been voluntarily relinquished. Therefore, by virtue of ETI's acceptance of the franchise fee terms of the 1980 agreement, ETI is estopped from maintaining a statutory attack for alleged violations which occurred under the law both prior to and subsequent to enactment of the Cable Communications Act of 1984.
>
> The Court reiterates that the doctrine of quasi-estoppel demands a showing that the position currently maintained by a party is inconsistent with a position previously taken by that party. Clearly, by entering into the 1980 franchise and access agreements, ETI took the stance that it considered the agreement to be valid. Although § 19(A) of the franchise agreement compels ETI to comply at all times with state and federal laws and regulations, it can only be a fiction to suggest that ETI was unaware of the franchise fee ceiling set forth in 47 C.F.R. § 76.31. This record convincingly demonstrates that ETI and its representatives were knowledgeable participants in cable franchise negotiations in the City of Erie and throughout the country. Accordingly, at the time the instant agreement was negotiated and ultimately entered into, ETI was cognizant of or, at least, was chargeable for having knowledge of the statutory limitations imposed on franchise fee requirements. The Court finds that by accepting the terms of the franchise

agreement and its resultant benefits, ETI maintained the position that the fee arrangement was valid and enforceable.

659 F.Supp. at 586-587.

The trial court rejected the cable operator's contention it was under duress to offer franchise fees in excess of these statutory limitations.

The Court of Appeals affirmed this decision on different grounds, holding that the cable operator also made a knowing and voluntary waiver of First and Fourteenth Amendment constitutional objections to the franchise agreement. Analogizing with *D.H. Overmeyer v. Frick Co.*, 405 U.S. 174 (1972) and *Fuentes v. Shevin*, 407 U.S. (1972), the Court of Appeals held that a valid waiver of rights had been shown where the cable operator had widespread commercial experience, the cable operator and the franchising authority had equal bargaining power, the operator had the advice of counsel of the significance of the rights it was waiving, and the cable operator enjoyed a substantial benefit from the agreement by conclusively terminating the prospect of competition. 853 F.2d at 1095-1097.

The present facts present an even more compelling case of waiver than *Erie*:

—Unlike ETI, Mountain has not claimed it acted under "duress." Rather, at oral argument Mountain's counsel stood by its Agreement with Burlington stating it is fair and enforceable.

—No suggestion has been made that Burlington had unequal bargaining power over Mountain.

—Mountain was represented by experienced counsel, was fully aware of its rights under the Cable Act of 1984, and consciously gave them up as bargained-for consideration to obtain withdrawal of

Burlington's application for a municipal CATV system.

—Mountain not only secured withdrawal of Burlington's competing application for a municipal cable system and a dismissal of Burlington's appeal of the Public Service Board Order granting Tele-Systems' right to re-franchise a new system without consideration of competing applications, but Mountain also *enlisted* Burlington's support in proceeding seeking P.S.B. approval of its acquisition of Tele-Systems.

—By ordering what is in effect a "partial rescission" of the Agreement, Mountain will have "become the sole cable operator in the city as a result of a protracted and complex . . . process" and would be allowed "to withdraw from performing its obligations and from discharging its burdens, while it still continues to retain all the benefits it received from the City as a result of the agreements." 853 F.2d at 1097.

The statutory limitations upon franchise fees and rate regulation in the 1984 Cable Act were designed for the protection and benefit of the cable operator. *Here Mountain does not seek that protection.*[2] Public policy is no more affronted by the waiver of these protections than it is when a criminal defendant makes a waiver of constitutional rights in a change of plea proceeding, e.g.,

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[2] There has been no ripe case or controversy between the *parties*, Burlington and Mountain, as to the validity of Paragraph § 4.03 of their Agreement, and unlike *Vt. D.P.S. v. M.M.W.E.C.*, No. 86-555 (Sept. 27, 1988), there has been no such claim advanced by a public advocate or other interested third party. The real dispute here has been between a judiciary acting *sua sponte*, and Burlington. The judicial power conferred by our State constitution cannot "be enlarged to include the giving of an opinion upon a question of law not involved in actual and bona fide litigation." *In re: Constitutionality of House Bill 88*, 115 Vt. 524, 529 (1949).

V.R.Cr.P. 11, or by knowing waiver of statutory rights in a commercial contract.

2. *There Is No Legal Basis For a Partial Rescission of the Agreement.*

This Court's November 10 opinion impeaching Paragraph 4.03 effects a partial rescission of the Agreement between Burlington and Mountain. However, *Erie* makes clear there is no basis for a partial impeachment or rescission of a franchise agreement when the disputed terms go to the essence of the bargain, even when the agreement contains a severability clause.

> Rescission "amounts to the unmaking of a contract, and is not merely a termination of the rights and obligations of the parties towards each other, but is an abrogation of all rights and responsibilities of the parties towards each other from the inception of the contract. It is a form of retroactive relief." In addition, while rescission may be inferred from the parties' action and thus need not be expressed in words, "there must be mutual agreement of the parties to rescind." Rescission of a contract is tantamount to relieving the parties of all obligations under the contract and returning to the *status quo ante* as it existed prior to the execution of the contract. Thus, rescission must occur in toto. Similarly, voiding a contract as inconsistent with public policy requires complete invalidation of the contract.

853 F.2d at 1093 (Citations omitted.)

Though this holding was based upon Pennsylvania law, it is in accord with our own law that settlement agreements must either be enforced entirely or rescinded entirely upon an election of remedies. *Spaulding v. Cahill*, 146 Vt. 386, 388 (1985):

> . . . Until the terms of such an agreement are satisfied, duties under the original claim are suspended; if there is a breach of the settlement agreement, however, the nonbreaching party may seek enforcement of either the original claim or the settlement agreement. Restatement (Second) of Contracts § 281(2) (1981); see also *Ladd v. General Insurance Co.*, 236 Or. 260, 267, 387 P.2d 572, 576 (1963); Corbin, *supra*, § 1271, at 93-94 Restatement of Contracts § 417(d) (1932).

Also see 15 A C.J.S., *Settlement & Compromise* § 30 P. 246; § 43.

Preservation of consumer protection from profit maximization which otherwise would have inured to Burlington's CATV subscribers from a municipally owned and operated system was essential to the bargain with Mountain. Unlike the franchise agreement in *Erie*, the Burlington/Mountain Agreement has no severability clause.

To effect a rescission of this settlement Agreement, the Court must return the parties fully to the *status quo ante*. This entails:

—reinstating Burlington's appeal from Public Service Board Docket No. 4853, Vermont Supreme Court Docket No. 85-110;

—reinstating Public Service Board Docket No. 4953 regarding Burlington's Application for a Municipal CATV System;

—Reinstating Public Service Board Docket No. 4908 regarding Mountain's petition to acquire the assets of its predecessor Tele-Systems. Burlington supported this acquisition only after reaching this agreement with Mountain.

If Burlingon is to be denied the full benefit of its bargain, then it must be provided the opportunity to pursue and litigate all these claims and issues which it gave up. This must mean that Mountain does not now possess a valid certificate of public good from the Public Service Board (Docket No. 4980), that Burlington's application must now be considered by the Public Service Board (Docket No. 4453), and that this Court must consider Burlington's claims that the P.S.B.'s 1984 refranchising of Tele-Systems' new system without a competitive proceeding was error (P.S.B. Docket No. 4853; Vermont Supreme Court Docket No. 85-110).

The practical obstacles to a resurrection of the *status quo ante* in effect in 1984 are obvious. This only underscores the advantage Mountain received and continues to enjoy from this Agreement.

> By entering into the settlement which required all parties to discontinue any challenge to the franchise agreement, ETI was able to terminate conclusively any competition that it faced from other cable companies with respect to its monopoly and profits during the ten year duration of the franchise and access agreements. *See, Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119, 127-28 (7th Cir. 1982); *Berkshire Cablevision of Rhode Island, Inc. v. Burke*, 571 Supp. 976, 985 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985).

853 F.2d at 1097.

Burlington exercised valuable forbearance in not pursuing a municipal CATV system. The fair way to ensure that the citizens of Burlington fully benefit from their forebearance, to guarantee that they are made whole, is to enforce the Agreement in its entirety as both Burlington and Mountain are willing to do.

Reargument on these authorities ought to be granted.

DATED at Burlington, Vermont this 16 day of November, 1988.

CITY OF BURLINGTON, VERMONT

By: /s/ John L. Franco, Jr.
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Assistant City Attorney
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IN THE SUPREME COURT
OF THE STATE OF VERMONT
November Term, 1987

Supreme Court Docket No. 87-156

CITY OF BURLINGTON

v.

MOUNTAIN CABLE COMPANY

Appealed from Chittenden Superior Court
Docket No. S1190-86CnC

ENTRY ORDER

[Filed Feb. 16, 1989]

In the above entitled cause the Clerk will enter:

In its motion for reargument, filed on November 17, 1988, the City of Burlington fails to identify points of law or fact previously overlooked or misapprehended. The motion is therefore denied.

FOR THE COURT:

/s/ Frederic W. Allen
Chief Justice

Concurring:

/s/ Louis P. Peck
LOUIS P. PECK
Associate Justice

/s/ Frank G. Mahady
FRANK G. MAHADY
Associate Justice

/s/ Ernest W. Gibson III
ERNEST W. GIBSON
Associate Justice

/s/ F. Ray Keyser
F. RAY KEYSER
Associate Justice (Ret.)

SUPERIOR COURT
STATE OF VERMONT
Chittenden County

Docket No. S 1190-86 CnC

CITY OF BURLINGTON

v.

MOUNTAIN CABLE COMPANY

MEMORANDUM OF DECISION

[Filed Dec. 31, 1986]

The City of Burlington ("City") has brought this lawsuit to enjoin Mountain Cable Company ("Mountain") from increasing its basic cable television rates starting December 30. We decline to issue a preliminary injunction barring the increase at this time.

"An injunction is an extraordinary remedy and will not be granted routinely unless the right to relief is clear." *Vermont Div. of State Bldgs. v. Town of Castleton Bd. of Adj.*, 138 Vt. 250, 256, 415 A.2d 188 (1980). Such an injunction, coming at the very beginning of the case is committed to the sound discretion of the court, for it may have a very substantial effect on a party who has only recently been given notice that it is facing a claim or lawsuit. Unless the court is convinced with reasonable certainty that the party seeking the preliminary injunction must succeed at final hearing, the injunction should be denied. *H. E. Fletcher Co. v. Rock of*

Ages Corp., 326 F.2d 13 (2d Cir. 1963). Further, that party must show that absent the injunction, it will suffer a harm for which the ordinary remedies of the law cannot recompense—what the law calls irreparable injury. *Vermont Accident Ins. Co. v. Burns*, 114 Vt. 143, 147, 40 A.2d 707 (1944). An injunction is an extraordinary remedy, and will not be granted routinely unless the right to relief is clear. *Committee to Save the Bishop's House v. Medical Ctr. Hosp. of Vermont, Inc.*, 136 Vt. 213, 218, 388 A.2d 827 (1978).

The United States Supreme Court has endorsed a four-factor test in assessing the propriety of granting preliminary injunctive relief: (1) the moving party must make a strong showing of likely success on the merits; (2) the petitioner must demonstrate that, in the absence of the injunction, it will suffer irreparable injury; (3) the movant must show that other parties interested in the proceeding will not be substantially harmed by the injunction; and (4) the public interest must be evaluated. *Sampson v. Murray*, 415 U.S. 61, 83 84 n.53 (1974).

Vermont's Rule governing injunctions, Rule 65(c), V.R.C.P., finally requires us to determine that an appropriate bond be posted to secure the defendant from any damages suffered because of a preliminary injunction later determined improperly issued. *Committee to Save the Bishop's House*, 136 Vt. 219-20. Here, the City asserts that, as a municipality, it is exempted from having to post the security required of ordinary litigants. It relies on *Town of Milton v. Brault*, 132 Vt. 377, 320 A.2d 630 (1974). There is no doubt our court labelled the bond, which had been secured by Milton, as "unnecessary," *id.* at 379, in a context where that description clearly arises from the plaintiff being a municipality. However, a careful reading of the opinion shows that conclusion to be grounded in the fact that Milton posted a bond "although it was not required to do so, under the *then* applicable law, Chancery Rule 41." 132 Vt. 378

(emphasis supplied). The old Chancery Rules were superceded in 1971 by our present Rules of Civil Procedure. These new Rules provide that no security shall be required of "the State of Vermont or an officer or agency thereof." Rule 65(c). The City is not the same as the State, nor is it an officer or agency. Although our court in *Town of Milton* went on to note that a bond was not required of Milton at any subsequent time, citing the present Rule, 132 Vt. 378, we take that reference to mean that current Rule 65 did not require a bond to be posted during such portion of that proceeding as may have occurred after its promulgation. We do not understand the court to hold that a municipality—ordinarily considered a subdivision of the State—is an agency, and that municipalities are broadly exempt from posting security. Hence, if this court were disposed to enjoin Mountain from implementing its intended rate increase, the court would expect to condition such an order on the posting by City of adequate security to protect Mountain from losses occasioned by the injunction.

This litigation centers around a few words in the contract made by the parties in 1984. That language, in paragraph 4.03, provides that after deregulation of the cable television industry, and after Mountain has determined its "initial deregulated monthly rate for Basic Cable Service in Burlington," Mountain may "thereafter raise the Deregulated Basic Rate on an annual basis" in one of three ways. The parties have focused their attention on the proper construction of these words, and whether they permit the first annual increase immediately upon deregulation and the determination of the initial deregulated monthly rate, or whether the first annual increase must await passage of a year from the date of deregulation.

It is clear that the contract in question was written against the backdrop of then newly enacted federal legislation, the Cable Commmunications Policy Act of 1984

("Act"), now codified as 47 U.S.C. §§ 521 *et seq.* As we shall discuss below, there is a serious question as to whether the contract in question may contravene portions of the Act. If that were so, it might render the contract unenforceable. Even though it would seem to be in Mountain's advantage to attack the contract as violative of federal law, it has declined to do so. Apparently this reticence is rooted in Section 10 of the contract, which provides:

> Each party further acknowledges and agrees that it will not initiate any collateral attack upon this Agreement or upon any of the terms, conditions, or provisions contained herein by any action commenced in any court, tribunal, agency, board, commission, or other forum of the State of Vermont, the United States, or any other state or jurisdiction.

Mountain, at least in this case, appears true to its promise. However, as a court of law, we are bound to uphold all applicable law, including federal. *Testa v. Katt*, 330 U.S. 386 (1947). A litigant may be at liberty to avoid raising a possible defense, but we have no equivalent liberty to wink at what may be a nettlesome area of the law.

Courts will not lend their aid to enforce an illegal act, *Batchelder v. Mantak*, 136 Vt. 456, 464, 392 A.2d 945 (1978), and therefore must inquire into the legality of the contracts which come before them for enforcement. Individual parties cannot cripple the functions of the Legislature, otherwise properly exercised, by contractual agreement. *Century Arms, Inc. v. Kennedy*, 323 F.Supp. 1002 (D.Vt. 1971), *aff'd*, 449 F.2d 1306, *cert. denied*, 405 U.S. 1065. A contract whose performance is illegal may be held void and unenforceable. *My Sister's Place v. City of Burlington*, 139 Vt. 602, 433 A.2d 275 (1981).

We do not feel these venerable precepts regarding the proper role of the courts should be disregarded merely

because two parties may have agreed between themselves not to challenge their contract. A. L. Corbin, 6A *Corbin on Contracts*, 809. Were it any other way, parties could always thwart the doctrine of not enforcing illegal contracts by merely typing in the proper words. On the other hand, a party seeking to avoid enforcement of his contract could inevitably make asserted illegality known to the court without candidly attacking his agreement. Indeed such disingenuous conduct is here demonstrated by Mountain, which "takes no position at this time on the issue of federal preemption," but attaches a copy of a court decision which tends to undercut the continuing enforceability of its contract.

We therefore feel obliged to inquire as to whether the enforcement here sought by City is in any way contrary to requirements of federal law. In determining what, if any, effect the Act may have on this contract, we must first determine if it preempts state law which would otherwise govern, and if it does, then go on to determine whether the Act prohibits enforcement of the contract.

The Constitution of the United States includes what is termed a Supremacy Clause, Art. VI, Cl. 2. It provides that federal laws "shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the . . . laws of any state to the contrary notwithstanding." When Congress chooses to legislate, pursuant to its constitutional powers, courts must find that local laws have been preempted by federal regulation if they stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Trustees of the Diocese of Vermont v. State*, 145 Vt. 510, 514, 496 A.2d 151 (1985). We also note that the state law involved in *Diocese of Vermont* was that governing abandonment of easements, hence part of the common law, not statutory law. It is of course the common law here which would be called

upon to enforce the agreement between City and Mountain. But the common law, as all other sources of law, must yield to the greater authority of inconsistent federal law.

Congress explicitly considered the issue of preemption in the 1984 Act. It wrote:

> Except as provided in section 557 of this title, any provision of law of any State, political subdivision, or agency thereof . . . which is inconsistent with [the Act] shall be deemed preempted and superseded.

47 U.S.C. § 556(c). Congress can accomplish a total displacement of state law either by stating its intent to preempt an entire area expressly in the language of the statute, or by exhibiting an intent to occupy the field implicitly through the structure and purpose of a federal statute. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Even if Congress has not completely ousted state regulation in a field, federal law preempts any state law that conflicts with it. *Id.* at 525-26. For preemption purposes, a state law is said to conflict with a federal law when, under the circumstances of the particular case, it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 526.

The Act, including § 556, does not preempt the entire field of cable television regulation, so our inquiry must be whether either its express provisions or its effectiveness would be frustrated. *Housatonic Cable Vision Co. v. Department of Public Utility Control*, 622 F.Supp. 798, 806 (D.Conn. 1985).

Congress set forth its purposes right at the top of the Act. They include:

> (1) establish a national policy concerning cable communications;

> (2) . . . encourage the growth and development of cable systems . . .
>
> (6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

47 U.S.C. § 521. While Congress nowhere states a purpose of providing minimum cable programming at low costs, it does consider the interest of consumers; but, that interest is seen in terms of "the widest possible diversity of information sources and services to the public." *Id.* at (4). Congress further decreed that "[a]ny cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service." § 541(c). And finally, perhaps the Act's penultimate provision states that a "State may not regulate the rates for the provision of cable service except to the extent provided under this section." § 543(a).

It is therefore clear that Congress established as national policy that cable television systems should be "deregulated" insofar as rates are concerned. Evidently that body was impressed that this industry is one with many participants, both large and small. As this court understands the industry, companies participating in it are bought and sold on the basis of the number of present paying subscribers, thereby creating an impetus for any cable operator to keep basic rates low enough so as to maximize its subscriber base. Finally, cable competes with individual consumer television reception by antennae or satellite dishes, as well as radio, the movies, VCRs and other sources of entertainment and information. These considerations, however, were for the Congress and their wisdom is not for us to review. We only note them in passing to the conclusion that cable television systems, as a matter of national economic policy, are no longer to be regulated as are other utiilities. Congress has determined to subject them to the regulation of the marketplace.

The court does not understand City or Mountain to disagree with this premise. Indeed their very contract is premised upon the concept that cable television in Burlington would be deregulated. Par. 4.03.

Congress has determined to deregulate cable television rate setting, and to preempt the thicket of existing state regulation of cable rates. Its preemption extends to the common law of libel, slander and invasion of privacy, § 558, and we have no hesitation that it likewise extends to any state common law of contract which might impair the stated national objectives and policy.

Turning to the specific operative section of the Act, § 543 previously quoted, we must start with the premise that no state may regulate cable rates. "State" is defined to mean "any State, or political subdivision . . . thereof." § 522(15). The City of Burlington is such a subdivision, hence it may not regulate rates, if the State of Vermont may not. Moreover, we cannot lose sight of the fact that this court is effectively an agency of the State, when it enforces the law, even if it is not a part of the executive branch. From the federal vantage point, this court is a State agency under § 522 of the Act, and is therefore also prohibited from regulating rates. As such, it follows that we may not become ensnared in determining Mountain's "costs associated with the provision of Basic Cable Services." Yet that language of pargraph 4.03 establishes what would be required of us, were this contract to be enforced.

Although there are exceptions to § 543's proscription of rate regulation, the City has pointed us to none which would apply to either the court or the City in this case; and, we can find no saving authority.

We therefore conclude that, as a matter of preempting federal law, neither the City nor this court may regulate the rates of Mountain after the effective date of the Act's proscriptions. As the Act was enacted October 30,

1984, Pub.L. 98-549, § 2, and its effective date was 60 days after date of enactment, see note at 47 U.S.C. § 521, that date was December 29, 1984. Section 543(c) includes a two year implementation period, so the effective date of its rate regulation bar was December 29, 1986.

Going back to the contract itself, paragraph 4.03 is nothing if not a limitation on the rates which may be charged by Mountain for basic cable service. It is precisely the enjoining of a rate increase which City here seeks. Yet that is what Congress has determined shall not be continued, after December 29, 1986. The fact that paragraph 4.03's rate limitation is apparently perpetual only underscores its discordance with federal policy and law. At a time when Congress has determined to promote competition and minimize regulation of cable television, and has prohibited "regulating the rates for the provision of cable services," City comes forth to summon the law to accomplish precisely the opposite. City wants this court to prevent Mountain from setting its rates solely according to the constraints of the marketplace, to determine when Mountain may first raise its rates, and ultimately to determine whether any rate increase is based upon actual or legitimate costs of providing basic services. The earlier concommitants of City's position are straightforward, but contrary to congressional intent. The last would necessarily immerse this court in traditional ratemaking, involving all the complex economic, accounting and legal considerations that have been the traditional preserve of state utility regulators. The contracts of litigants frequently force demanding tasks upon this court, but not when Congress has prohibited the very activity which is demanded of the court.

We therefore conclude that paragraph 4.03 is illegal insofar as it would force this court to engage in activity which Congress has prohibited by the 1984 Act. We must therefore refuse to enforce such provisions of the

contract. Having reached this conclusion, we return to our starting point of considerations for the granting of preliminary injunctions. But when we conclude that not only is the party seeking the preliminary injunction not likely to prevail in the end, but also that the very act of enjoining would appear to violate preempting federal law, such an injunction request must surely be denied.

Having stated this conclusion, we feel we should nevertheless consider the City's argument that its contract with Mountain is something more than a mere contract. City asserts it to have the quality of a "judgment order of the court" because the agreement represented these parties' settlement of numerous claims then pending before Vermont's Public Service Board and Supreme Court.

We must first observe that although Section 10 does use that language, courts are not necessarily governed by words implying a decretal quality to what remains merely an agreement between signators. Specifically, a compromise settlement which is itself contrary to statute remains unenforceable. 15A C.J.S. *Compromise & Settlement*, § 38. Secondly, we note that there is here no Public Service Board order or Vermont Supreme Court judgment or mandate at issue. Instead, those entries brought to our attention are merely pro forma dismissals. Although City is correct in stating that a judgment entered upon settlement is equally effective as one decided on the merits, that argument only concerns the course and effect of the former case. For example, Mountain's predecessor sued City to declare that City had no authority to impose certain street excavation charges. By viture of the stipulated dismissal, the predecessor's claims regarding excavation were dismissed as surely as if it had lost a concluded contested trial. But there was never any litigation regarding post-deregulation control of rates. There is no decree regarding that issue, hence there is no preclusion. What we have here is a contract —nothing more, or less. The contract provided for dis-

missals of different proceedings, and part of its consideration was paragraph 4.03's rate regulation, but the latter is not itself any judicial or quasi-judicial decree. Neither is it incorporated in any such instrument thus far shown to this court. Moreover, we should keep in mind that common law doctrines of claim or issue preclusion may be preempted as surely as more substantial rules of law.

Finally, whatever the rate-limiting document may be called does not govern its preemption by the Act. *See, American Television & Communications Corp. v. City of Montevideo*, 603 F.Supp. 1376, 1378 (D.Minn. 1985). Assuming as true City's argument that the document at issue has the effect of settling a contested Public Service Board proceeding, and therefore should be accorded the qualities of a final PSB order, it would then constitute a franchising authority's regulation of rates, beyond the conceded date of deregulation, which would be impermissible under § 543 of the Act. When Congress set about to establish a new national policy governing cable television, it knew that it could not catalog all conceivable variants or nomenclature of rate regulation throughout the 50 states. It therefore employed broad language, overarching all legal rubrics. Section 543(a) (no state shall regulate rates); § 522(8) (concept of franchise does not depend on what a state may call it); § 522(15) ("State" includes City, Public Service Board and this court).

We therefore do not see how the contract can be imbued with some particular sanctity, or that even if it were it would thereby become inviolable.

City finally advances the argument that application of the Act to its contract would "impair" the value of the latter. This contention is quickly dismissed. The Act was enacted October 30, 1984; this agreement was made

June 10, 1985, or conceivably April 2, 1985. Having been made after enactment, the agreement was destined from birth to be preempted.

The motion for a preliminary injunction is DENIED.

Dated at Burlington, Vermont, December 31, 1986.

/s/ Matthew I. Katz
Superior Judge

STATUTORY PROVISIONS INVOLVED

Public Law 98-549
98th Congress

An Act

To amend the Communications Act of 1934 to provide a national policy regarding cable television.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE; TABLE OF CONTENTS

SECTION 1. (a) This Act may be cited as the "Cable Communications Policy Act of 1984".

(b) The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Amendment of Communications Act of 1934.

"TITLE VI—CABLE COMMUNICATIONS

"PART I—GENERAL PROVISIONS

"Sec. 601. Purposes.
"Sec. 602. Definitions.

"PART II—USE OF CABLE CHANNELS AND OWNERSHIP RESTRICTIONS

"Sec. 611. Cable channels for public, educational, or governmental use.
"Sec. 612. Cable channels for commercial use.
"Sec. 613. Ownership restrictions.

"PART III—FRANCHISING AND REGULATION

"Sec. 621. General franchise requirements.
"Sec. 622. Franchise fees.

"Sec. 623. Regulation of rates.
"Sec. 624. Regulation of services, facilities, and equipment.
"Sec. 625. Modification of franchise obligations.
"Sec. 626. Renewal.
"Sec. 627. Conditions of sale.

"PART IV—MISCELLANEOUS PROVISIONS

"Sec. 631. Protection of subscriber privacy.
"Sec. 632. Consumer protection.
"Sec. 633. Unauthorized reception of cable service.
"Sec. 634. Equal employment opportunity.
"Sec. 635. Judicial proceedings.
"Sec. 636. Coordination of Federal, State, and local authority.
"Sec. 637. Existing franchises.
"Sec. 638. Criminal and civil liability.
"Sec. 639. Obscene programming.".
Sec. 3. Jurisdiction.
Sec. 4. Pole attachments.
Sec. 5. Unauthorized reception of certain communications.
Sec. 6. Technical and conforming amendments.
Sec. 7. Support of activities of the United States Telecommunications Training Institute.
Sec. 8. Telecommunications Policy Study Commission.
Sec. 9. Effective date.

AMENDMENT OF COMMUNICATIONS ACT OF 1934

SEC. 2. The Communications Act of 1934 is amended by inserting after title V the following new title:

"TITLE VI—CABLE COMMUNICATIONS

"PART I—GENERAL PROVISIONS

"PURPOSES

"SEC. 601. The purposes of this title are to—

"(1) establish a national policy concerning cable communications;

"(2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsible to the needs and interests of the local community;

"(3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;

"(4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;

"(5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this title; and

"(6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

"DEFINITIONS

"SEC. 602. For purposes of this title—

"(1) the term 'affiliate', when used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person;

"(2) the term 'basic cable service' means any service tier which includes the retransmission of local television broadcast signals;

"(3) the term 'cable channel' or 'channel' means a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation);

"(4) the term 'cable operator' means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system;

"(5) the term 'cable service' means—

"(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and

"(B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service;

"(6) the term 'cable system' means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is

provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act, except that such facility shall be considered a cable system (other than for purposes of section 621(c)) to the extent such facility is used in the transmission of video programming directly to subscribers; or (D) any facilities of any electric utility used solely for operating its electric utility systems;

"(7) the term 'Federal agency' means any agency of the United States, including the Commission;

"(8) the term 'franchise' means an initial authorization, or renewal thereof (including a renewal of an authorization which has been granted subject to section 626), issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system;

"(9) the term 'franchising authority' means any governmental entity empowered by Federal, State, or local law to grant a franchise;

"(10) the term 'grade B contour' means the field strength of a television broadcast station computed in accordance with regulations promulgated by the Commission;

"(11) the term 'other programming service' means information that a cable operator makes available to all subscribers generally;

"(12) the term 'person' means an individual, partnership, association, joint stock company, trust, corporation, or governmental entity;

"(13) the term 'public, educational, or governmental access facilities' means—

"(A) channel capacity designated for public, educational, or governmental use; and

"(B) facilities and equipment for the use of such channel capacity;

"(14) the term 'service tier' means a category of cable service or other services provided by a cable operator and for which a separate rate is charged by the cable operator;

"(15) the term 'State' means any State, or political subdivision, or agency thereof; and

"(16) the term 'video programming' means programming provided by, or generally considered comparable to programming provided by, a television broadcast station.

"PART II—USE OF CABLE CHANNELS AND CABLE OWNERSHIP RESTRICTIONS

"CABLE CHANNELS FOR PUBLIC, EDUCATIONAL, OR GOVERNMENTAL USE

"SEC. 611. (a) A franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use only to the extent provided in this section.

"(b) A franchising authority may in its request for proposals require as part of a franchise, and may require as part of a cable operator's proposal for a franchise re-

newal, subject to section 626, that channel capacity be designated for public, educational, or governmental use, and channel capacity on institutional networks be designated for educational or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.

"(c) A franchising authority may enforce any requirement in any franchise regarding the providing or use of such channel capacity. Such enforcement authority includes the authority to enforce any provisions of the franchise for services, facilities, or equipment proposed by the cable operator which relate to public, educational, or governmental use of channel capacity, whether or not required by the franchising authority pursuant to subsection (b).

"(d) In the case of any franchise under which channel capacity is designated under subsection (b), the franchising authority shall prescribe—

"(1) rules and procedures under which the cable operator is permitted to use such channel capacity for the provision of other services if such channel capacity is not being used for the purposes designated, and

"(2) rules and procedures under which such permitted use shall cease.

"(e) Subject to section 624(d), a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section.

"(f) For purposes of this section, the term 'institutional network' means a communication network which is constructed or operated by the cable operator and which is generally available only to subscribers who are not residential subscribers.

"CABLE CHANNELS FOR COMMERCIAL USE

"SEC. 612. (a) The purpose of this section is to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems.

"(b)(1) A cable operator shall designate channel capacity for commercial use by persons unaffiliated with the operator in accordance with the following requirements:

"(A) An operator of any cable system with 36 or more (but not more than 54) activated channels shall designate 10 percent of such channels which are not otherwise required for use (or the use of which is not prohibited) by Federal law or regulation.

"(B) An operator of any cable system with 55 or more (but not more than 100) activated channels shall designate 15 percent of such channels which are not otherwise required for use (or the use of which is not prohibited) by Federal law or regulation.

"(C) An operator of any cable system with more than 100 activated channels shall designate 15 percent of all such channels.

"(D) An operator of any cable system with fewer than 36 activated channels shall not be required to designate channel capacity for commercial use by persons unaffiliated with the operator, unless the cable system is required to provide such channel capacity under the terms of a franchise in effect on the date of the enactment of this title.

"(E) An operator of any cable system in operation on the date of the enactment of this title shall

not be required to remove any service actually being provided on July 1, 1984, in order to comply with this section, but shall make channel capacity available for commercial use as such capacity becomes available until such time as the cable operator is in full compliance with this section.

"(2) Any Federal agency, State, or franchising authority may not require any cable system to designate channel capacity for commercial use by unaffiliated persons in excess of the capacity specified in paragraph (1), except as otherwise provided in this section.

"(3) A cable operator may not be required, as part of a request for proposals or as part of a proposal for renewal, subject to section 626, to designate channel capacity for any use (other than commercial use by unaffiliated persons under this section) except as provided in sections 611 and 637, but a cable operator may offer in a franchise, or proposal for renewal thereof, to provide, consistent with applicable law, such capacity for other than commercial use by such persons.

"(4) A cable operator may use any unused channel capacity designated pursuant to this section until the use of such channel capacity is obtained, pursuant to a written agreement, by a person unaffiliated with the operator.

"(5) For the purposes of this section—

"(A) the term 'activated channels' means those channels engineered at the headend of the cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational, or governmental use; and

"(B) the term 'commercial use' means the provision of video programming, whether or not for profit.

"(6) Any channel capacity which has been designated for public, educational, or governmental use may not be considered as designated under this section for commercial use for purpose of this section.

"(c)(1) If a person unaffiliated with the cable operator seeks to use channel capacity designated pursuant to subsection (b) for commercial use, the cable operator shall establish, consistent with the purpose of this section, the price, terms, and conditions of such use which are at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system.

"(2) A cable operator shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming, except that an operator may consider such content to the minimum extent necessary to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person.

"(3) Any cable system channel designated in accordance with this section shall not be used to provide a cable service that is being provided over such system on the date of the enactment of this title, if the provision of such programming is intended to avoid the purpose of this section.

"(d) Any person aggrieved by the failure or refusal of a cable operator to make channel capacity available for use pursuant to this section may bring an action in the district court of the United States for the judicial district in which the cable system is located to compel that such capacity be made available. If the court finds that the channel capacity sought by such person has not been made available in accordance with this section, or finds that the price, terms, or conditions established by the cable operator are unreasonable, the court may order such system to make available to such person the chan-

nel capacity sought, and further determine the appropriate price, terms, or conditions for such use consistent with subsection (c), and may award actual damages if it deems such relief appropriate. In any such action, the court shall not consider any price, term, or condition established between an operator and an affiliate for comparable services.

"(e)(1) Any person aggrieved by the failure or refusal of a cable operator to make channel capacity available pursuant to this section may petition the Commission for relief under this subsection upon a showing of prior adjudicated violations of this section. Records of previous adjudications resulting in a court determination that the operator has violated this section shall be considered as sufficient for the showing necessary under this subsection. If the Commission finds that the channel capacity sought by such person has not been made available in accordance with this section, or that the price, terms, or conditions established by such system are unreasonable under subsection (c), the Commission shall, by rule or order, require such operator to make available such channel capacity under price, terms, and conditions consistent with subsection (c).

"(2) In any case in which the Commission finds that the prior adjudicated violations of this section constitute a pattern or practice of violations by an operator, the Commission may also establish any further rule or order necessary to assure that the operator provides the diversity of information sources required by this section.

"(3) In any case in which the Commission finds that the prior adjudicated violations of this section constitute a pattern or practice of violations by any person who is an operator of more than one cable system, the Commission may also establish any further rule or order necessary to assure that such person provides the diversity of information sources required by this section.

"(f) In any action brought under this section in any Federal district court or before the Commission, there shall be a presumption that the price, terms, and conditions for use of channel capacity designated pursuant to subsection (b) are reasonable and in good faith unless shown by clear and convincing evidence to the contrary.

"(g) Notwithstanding sections 621(c) and 623(a), at such time as cable systems with 36 or more activated channels are available to 70 percent of households within the United States and are subscribed to by 70 percent of the households to which such systems are available, the Commission may promulgate any additional rules necessary to provide diversity of information sources. Any rules promulgated by the Commission pursuant to this subsection shall not preempt authority expressly granted to franchising authorities under this title.

"(h) Any cable service offered pursuant to this section shall not be provided, or shall be provided subject to conditions, if such cable service in the judgment of the franchising authority is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the Constitution of the United States.

"OWNERSHIP RESTRICTIONS

"SEC. 613. (a) It shall be unlawful for any person to be a cable operator if such person, directly or through 1 or more affiliates, owns or controls, the licensee of a television broadcast station and the predicted grade B contour of such station covers any portion of the community served by such operator's cable system.

"(b)(1) It shall be unlawful for any common carrier, subject in whole or in part to title II of this Act, to provide video programming directly to subscribers in its telephone service area, either directly or indirectly

through an affiliate owned by, operated by, controlled by, or under common control with the common carrier.

"(2) It shall be unlawful for any common carrier, subject in whole or in part to title II of this Act, to provide channels of communications or pole line conduit space, or other rental arrangements to any entity which is directly or indirectly owned by, operated by, controlled by, or under common control with such common carrier, if such facilities or arrangements are to be used for, or in connection with, the provision of video programming directly to subscribers in the telephone service area of the common carrier.

"(3) This subsection shall not apply to any common carrier to the extent such carrier provides telephone exchange service in any rural area (as defined by the Commission).

"(4) In those areas where the provision of video programming directly to subscribers through a cable system demonstrably could not exist except through a cable system owned by, operated by, controlled by, or affiliated with the common carrier involved, or upon other showing of good cause, the Commission may, on petition for waiver, waive the applicability of paragraphs (1) and (2) of this subsection. Any such waiver shall be made in accordance with section 63.56 of title 47, Code of Federal Regulations (as in effect September 20, 1984) and shall be granted by the Commission upon a finding that the issuance of such waiver is justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection.

"(c) The Commission may prescribe rules with respect to the ownership or control of cable systems by persons who own or control other media of mass communications which serve the same community served by a cable system.

"(d) Any State or franchising authority may not prohibit the ownership or control of a cable system by any person because of such person's ownership or control of any media of mass communications or other media interests.

"(e)(1) Subject to paragraph (2), a State or franchising authority may hold any ownership interest in any cable system.

"(2) Any State or franchising authority shall not exercise any editorial control regarding the content of any cable service on a cable system in which such governmental entity holds ownership interest (other than programming on any channel designated for educational or governmental use), unless such control is exercised through an entity separate from the franchising authority.

"(f) This section shall not appy to prohibit any combination of any interests held by any person on July 1, 1984, to the extent of the interests so held as of such date, if the holding of such interests was not inconsistent with any applicable Federal or State law or regulations in effect on that date.

"(g) For purposes of this section, the term 'media of mass communications' shall have the meaning given such term under section 309(i)(3)(C)(i) of this Act.

"PART III—FRANCHISING AND REGULATION

"GENERAL FRANCHISE REQUIREMENTS

"SEC. 621. (a)(1) A franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction.

"(2) Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated

for compatible uses, except that in using such easements the cable operator shall ensure—

"(A) that the safety, functioning, and appearance of the property and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;

"(B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and

"(C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

"(3) In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.

"(b)(1) Except to the extent provided in paragraph (2), a cable operator may not provide cable service without a franchise.

"(2) Paragraph (1) shall not require any person lawfully providing cable service without a franchise on July 1, 1984, to obtain a franchise unless the franchising authority so requires.

"(c) Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.

"(d)(1) A State or the Commission may require the filing of informationa tariffs for any intrastate communications service provided by a cable system, other than cable service, that would be subject to regulation by the

Commission or any State if offered by a common carrier subject, in whole or in part, to title II of this Act. Such informational tariffs shall specify the rates, terms, and conditions for the provision of such service, including whether it is made available to all subscribers generally, and shall take effect on the date specified therein.

"(2) Nothing in this title shall be construed to affect the authority of any State to regulate any cable operator to the extent that such operator provides any communication service other than cable service, whether offered on a common carrier or private contract basis.

"(3) For purposes of this subsection, the term 'State' has the meaning given it in section 3(v).

"(e) Nothing in this title shall be construed to affect the authority of any State to license or otherwise regulate any facility or combination of facilities which serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management and which does not use any public right-of-way.

"FRANCHISE FEES

"SEC. 622. (a) Subject to the limitation of subsection (b), any cable operator may be required under the terms of any franchise to pay a franchise fee.

"(b) For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system. For purposes of this section, the 12-month period shall be the 12-month period applicable under the franchise for accounting purposes. Nothing in this subsection shall prohibit a franchising authority and a cable operator from agreeing that franchise fees which lawfully could be collected for any such 12-month period shall be paid on a prepaid or deferred basis; ex-

cept that the sum of the fees paid during the term of the franchise may not exceed the amount, including the time value of money, which would have lawfully been collected if such fees had been paid per annum.

"(c) A cable operator may pass through to subscribers the amount of any increase in a franchise fee, unless the franchising authority demonstrates that the rate structure specified in the franchise reflects all costs of franchise fees and so notifies the cable operator in writing.

"(d) In any court action under subsection (c), the franchising authority shall demonstrate that the rate structure reflects all costs of the franchise fees.

"(e) Any cable operator shall pass through to subscribers the amount of any decrease in a franchise fee.

"(f) A cable operator may designate that portion of a subscriber's bill attributable to the franchise fee as a separate item on the bill.

"(g) For the purposes of this section—

"(1) the term 'franchise fee' includes any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such;

"(2) the term 'franchise fee' does not include—

"(A) any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services but not including a tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers);

"(B) in the case of any franchise in effect on the date of the enactment of this title, pay-

ments which are required by the franchise to be made by the cable operator during the term of such franchise for, or in support of the use of, public, educational, or governmental access facilities;

"(C) in the case of any franchise granted after such date of enactment, capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities;

"(D) requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages; or

"(E) any fee imposed under title 17, United States Code.

"(h)(1) Nothing in this Act shall be construed to limit any authority of a franchising authority to impose a tax, fee, or other assessment of any kind on any person (other than a cable operator) with respect to cable service or other communications service provided by such person over a cable system for which charges are assessed to subscribers but not received by the cable operator.

"(2) For any 12-month period, the fees paid by such person with respect to any such cable service or other communications service shall not exceed 5 percent of such person's gross revenues derived in such period from the provision of such service over the cable system.

"(i) Any Federal agency may not regulate the amount of the franchise fees paid by a cable operator, or regulate the use of funds derived from such fees, except as provided in this section.

"REGULATION OF RATES

"SEC. 623. (a) Any Federal agency or State may not regulate the rates for the provision of cable service except to the extent provided under this section. Any franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section.

"(b)(1) Within 180 days after the date of the enactment of this title, the Commission shall prescribe and make effective regulations which authorize a franchising authority to regulate rates for the provision of basic cable service in circumstances in which a cable system is not subject to effective competition. Such regulations may apply to any franchise granted after the effective date of such regulations. Such regulations shall not apply to any rate while such rate is subject to the provisions of subsection (c).

"(2) For purposes of rate regulation under this subsection, such regulations shall—

"(A) define the circumstances in which a cable system is not subject to effective competition; and

"(B) establish standards for such rate regulation.

"(3) The Commission shall periodically review such regulations, taking into account developments in technology, and may amend such regulations, consistent with paragraphs (1) and (2), to the extent the Commission determines necessary.

"(c) In the case of any cable system for which a franchise has been granted on or before the effective date of this title, until the end of the 2-year period beginning on such effective date, the franchising authority may, to the extent provided in a franchise—

"(1) regulate the rates for the provision of basic cable service, including multiple tiers of basic cable service;

"(2) require the provision of any service tier provided without charge (disregarding any installation or rental charge for equipment necessary for receipt of such tier); or

"(3) regulate rates for the initial installation or the rental of 1 set of the minimum equipment which is necessary for the subscriber's receipt of basic cable service.

"(d) Any request for an increase in any rate regulated pursuant to subsection (b) or (c) for which final action is not taken within 180 days after receipt of such request by the franchising authority shall be deemed to be granted, unless the 180-day period is extended by mutual agreement of the cable operator and the franchising authority.

"(e)(1) In addition to any other rate increase which is subject to the approval of a franchising authority, any rate subject to regulation pursuant to this section may be increased after the effective date of this title at the discretion of the cable operator by an amount not to exceed 5 percent per year if the franchise (as in effect on the effective date of this title) does not specify a fixed rate or rates for basic cable service for a specified period or periods which would be exceeded if such increase took effect.

"(2) Nothing in this section shall be construed to limit provisions of a franchise which permits a cable operator to increase any rate at the operator's discretion; however, the aggregate increases per year allowed under paragraph (1) shall be reduced by the amount of any increase taken such year under such franchise provisions.

"(f) Nothing in this title shall be construed as prohibiting any Federal agency, State, or a franchising authority, from—

"(1) prohibiting discrimination among customers of basic cable service, or

"(2) requiring and regulating the installation or rental of equipment which facilitates the reception of basic cable service by hearing impaired individuals.

"(g) Any State law in existence on the effective date of this title which provides for any limitation or preemption of regulation by any franchising authority (or the State or any political subdivision or agency thereof) of rates for cable service shall remain in effect during the 2-year period beginning on such effective date, to the extent such law provides for such limitation or preemption. As used in this section, the term 'State' has the meaning given it in section 3(v).

"(h) Not later than 6 years after the date of the enactment of this title, the Commission shall prepare and submit to the Congress a report regarding rate regulation of cable services, including such legislative recommendations as the Commission considers appropriate. Such report and recommendations shall be based on a study of such regulation which the Commission shall conduct regarding the effect of competition in the marketplace.

"REGULATION OF SERVICES, FACILITIES, AND EQUIPMENT

"SEC. 624. (a) Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this title.

"(b) In the case of any franchise granted after the effective date of this title, the franchising authority, to

the extent related to the establishment or operation of a cable system—

"(1) in its request for proposals for a franchise (including requests for renewal proposals, subject to section 626), may establish requirements for facilities and equipment, but may not establish requirements for video programming or other information services; and

"(2) subject to section 625, may enforce any requirements contained within the franchise—

"(A) for facilities and equipment; and

"(B) for broad categories of video programming or other services.

"(c) In the case of any franchise in effect on the effective date of this title, the franchising authority may, subject to section 625, enforce requirements contained within the franchise for the provision of services, facilities, and equipment, whether or not related to the establishment or operation of a cable system.

"(d)(1) Nothing in this title shall be construed as prohibiting a franchising authority and a cable operator from specifying, in a franchise or renewal thereof, that certain cable services shall not be provided or shall be provided subject to conditions, if such cable services are obscene or are otherwise unprotected by the Constitution of the United States.

"(2)(A) In order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber.

"(B) Subparagraph (A) shall take effect 180 days after the effective date of this title.

"(e) The Commission may establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise.

"(f)(1) Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title.

"(2) Paragraph (1) shall not apply to—

"(A) any rule, regulation, or order issued under any Federal law, as such rule, regulation, or order (i) was in effect on September 21, 1983, or (ii) may be amended after such date if the rule, regulation, or order as amended is not inconsistent with the express provisions of this title; and

"(B) any rule, regulation, or order under title 17, United States Code.

"MODIFICATION OF FRANCHISE OBLIGATIONS

"SEC. 625. (a)(1) During the period a franchise is in effect, the cable operator may obtain from the franchising authority modifications of the requirements in such franchise—

"(A) in the case of any such requirement for facilities or equipment, including public, educational, or governmental access facilities or equipment, if the cable operator demonstrates that (i) it is commercially impracticable for the operator to comply with such requirement, and (ii) the proposal by the cable operator for modification of such requirement is appropriate because of commercial impracticability; or

"(B) in the case of any such requirement for services, if the cable operator demonstrates that the mix, quality, and level of services required by the

franchise at the time it was granted will be maintained after such modification.

"(2) Any final decision by a franchising authority under this subsection shall be made in a public proceeding. Such decision shall be made within 120 days after receipt of such request by the franchising authority, unless such 120 day period is extended by mutual agreement of the cable operator and the franchising authority.

"(b) (1) Any cable operator whose request for modification under subsection (a) has been denied by a final decision of a franchising authority may obtain modification of such franchise requirements pursuant to the provisions of section 635.

"(2) In the case of any proposed modification of a requirement for facilities or equipment, the court shall grant such modification only if the cable operator demonstrates to the court that—

"(A) it is commercially impracticable for the operator to comply with such requirement; and

"(B) the terms of the modification requested are appropriate because of commercial impracticability.

"(3 In the case of any proposed modification of a requirement for services, the court shall grant such modification only if the cable operator demonstrates to the court that the mix, quality, and level of services required by the franchise at the time it was granted will be maintained after such modification.

"(c) Notwithstanding subsections (a) and (b), a cable operator may, upon 30 days' advance notice to the franchising authority, rearrange, replace, or remove a particular cable service required by the franchise if—

"(1) such service is no longer available to the operator; or

"(2) such service is available to the operator only upon the payment of a royalty required under section 801(b)(2) of title 17, United States Code, which the cable operator can document—

"(A) is substantially in excess of the amount of such payment required on the date of the operator's offer to provide such service, and

"(B) has not been specifically compensated for through a rate increase or other adjustment.

"(d) Notwithstanding subsections (a) and (b), a cable operator may take such actions to rearrange a particular service from one service tier to another, or otherwise offer the service, if the rates for all of the service tiers involved in such actions are not subject to regulation under section 623.

"(e) A cable operator may not obtain modification under this section of any requirement for services relating to public, educational, or governmental access.

"(f) For purposes of this section, the term 'commercially impracticable' means, with respect to any requirement applicable to a cable operator, that it is commercially impracticable for the operator to comply with such requirement as a result of a change in conditions which is beyond the control of the operator and the nonoccurrence of which was a basic assumption on which the requirement was based.

"RENEWAL

"SEC. 626. (a) During the 6-month period, which begins with the 36th month before the franchise expiration, the franchising authority may on its own initiative, and shall at the request of the cable operator, commence proceedings which afford the public in the franchise area appropriate notice and participation for the purpose of—

"(1) identifying the future cable-related community needs and interests; and

"(2) reviewing the performance of the cable operator under the franchise during the then current franchise term.

"(b)(1) Upon completion of a proceeding under subsection (a), a cable operator seeking renewal of a franchise may, on its own initiative or at the request of a franchising authority, submit a proposal for renewal.

"(2) Subject to section 624, any such proposal shall contain such material as the franchising authority may require, including proposals for an upgrade of the cable system.

"(3) The franchising authority may establish a date by which such proposal shall be submitted.

"(c)(1) Upon submittal by a cable operator of a proposal to the franchising authority for the renewal of a franchise, the franchising authority shall provide prompt public notice of such proposal and, during the 4-month period which begins on the completion of any proceedings under subsection (a), renew the franchise or, issue a preliminary assessment that the franchise should not be renewed and, at the request of the operator or on its own initiative, commence an administrative proceeding, after providing prompt public notice of such proceeding, in accordance with pargraph (2) to consider whether—

"(A) the cable operator has substantially complied with the material terms of the existing franchise and with applicable law;

"(B) the quality of the operator's service, including signal quality, response to consumer complaints, and billing practices, but without regard to the mix, quality, or level of cable services or other services provided over the system, has been reasonable in light of community needs;

"(C) the operator has the financial, legal, and technical ability to provide the services, facilities,

and equipment as set forth in the operator's proposal; and

"(D) the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests.

"(2) In any proceeding under paragraph (1), the cable operator shall be afforded adequate notice and the cable operator and the franchise authority, or its designee, shall be afforded fair opportunity for full participation, including the right to introduce evidence (including evidence related to issues raised in the proceeding under subsection (a)), to require the production of evidence, and to question witnesses. A transcript shall be made of any such proceeding.

"(3) At the completion of a proceeding under this subsection, the franchising authority shall issue a written decision granting or denying the proposal for renewal based upon the record of such proceeding, and transmit a copy of such decision to the cable operator. Such decision shall state the reasons therefor.

"(d) Any denial of a proposal for renewal shall be based on one or more adverse findings made with respect to the factors described in subparagraphs (A) through (D) of subsection (c)(1), pursuant to the record of the proceeding under subsection (c). A franchising authority may not base a denial of renewal on a failure to substantially comply with the material terms of the franchise under subsection (c)(1)(A) or on events considered under subsection (c)(1)(B) in any case in which a violation of the franchise or the events considered under subsection (c)(1)(B) occur after the effective date of this title unless the franchising authority has provided the operator with notice and the opportunity to cure, or in any case in which it is documented that the franchis-

ing authority has waived its right to object, or has effectively acquiesced.

"(e)(1) Any cable operator whose proposal for renewal has been denied by a final decision of a franchising authority made pursuant to this section, or has been adversely affected by a failure of the franchising authority to act in accordance with the procedural requirements of this section, may appeal such final decision or failure pursuant to the provisions of section 635.

"(2) The court shall grant appropriate relief if the court finds that—

"(A) any action of the franchising authority is not in compliance with the procedural requirements of this section; or

"(B) in the event of a final decision of the franchising authority denying the renewal proposal, the operator has demonstrated that the adverse finding of the franchising authority with respect to each of the factors described in subparagraphs (A) through (D) of subsection (c)(1) on which the denial is based is not supported by a preponderance of the evidence, based on the record of the proceeding conducted under subsection (c).

"(f) Any decision of a franchising authority on a proposal for renewal shall not be considered final unless all administrative review by the State has occurred or the opportunity therefor has lapsed.

"g) For purposes of this section, the term 'franchise expiration' means the date of the expiration of the term of the franchise, as provided under the franchise, as it was in effect on the date of the enactment of this title.

"(h) Notwithstanding the provisions of subsections (a) through (g) of this section, a cable operator may submit a proposal for the renewal of a franchise pursant to this subsection at any time, and a franchising author-

ity may, after affording the public adequate notice and opportunity for comment, grant or deny such proposal at any time (including after proceedings pursuant to this section have commenced). The provisions of subsections (a) through (g) of this section shall not apply to a decision to grant or deny a proposal under this subsection. The denial of a renewal pursuant to this subsection shall not affect action on a renewal proposal that is submitted in accordance with subsections (a) through (g).

"CONDITIONS OF SALE

"SEC. 627. (a) If a renewal of a franchise held by a cable operator is denied and the franchising authority acquires ownership of the cable system or effects a transfer of ownership of the system to another person, any such acquisition or transfer shall be—

"(1) at fair market value, determined on the basis of the cable system valued as a going concern but with no value allocated to the franchise itself, or

"(2) in the case of any franchise existing on the effective date of this title, at a price determined in accordance with the franchise if such franchise contains provisions applicable to such an acquisition or transfer.

"(b) If a franchise held by a cable operator is revoked for cause and the franchising authority acquires ownership of the cable system or effects a transfer of ownership of the system to another person, any such acquisition or transfer shall be—

"(1) at an equitable price, or

"(2) in the case of any franchise existing on the effective date of this title, at a price determined in accordance with the franchise if such franchise contains provisions applicable to such as acquisition or transfer.

"PART IV—MISCELLANEOUS PROVISIONS
"PROTECTION OF SUBSCRIBER PRIVACY

"SEC. 631. (a)(1) At the time of entering into an agreement to provide any cable service or other service to a subscriber and at least once a year thereafter, a cable operator shall provide notice in the form of a separate, written statement to such subscriber which clearly and conspicuously informs the subscriber of—

"(A) the nature of personally identifiable information collected or to be collected with respect to the subscriber and the nature of the use of such information;

"(B) the nature, frequency, and purpose of any disclosure which may be made of such information, including an identification of the types of persons to whom the disclosure may be made;

"(C) the period during which such information will be maintained by the cable operator;

"(D) the times and place at which the subscriber may have access to such information in accordance with subsection (d); and

"(E) the limitations provided by this section with respect to the collection and disclosure of information by a cable operator and the right of the subscriber under subsections (f) and (h) to enforce such limitations.

In the case of subscribers who have entered into such an agreement befoer the effective date of this section, such notice shall be provided within 180 days of such date and at least once a year thereafter.

"(2) For purposes of this section, the term personally identifiable information' does not include any record of aggregate data which does not identify particular persons.

"(b)(1) Except as provided in paragraph (2), a cable operator shall not use the cable system to collect personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned.

"(2) A cable operator may use the cable system to collect such information in order to—

"(A) obtain information necessary to render a cable service or other service provided by the cable operator to the subscriber; or

"(B) detect unauthorized reception of cable communications.

"(c)(1) Except as provided in paragraph (2), a cable operator shall not disclose personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned.

"(2) A cable operator may disclosue such information if the disclosure is—

"(A) necessary to render, or conduct a legitimate business activity related to, a cable service or other service provided by the cable operator to the subscriber;

"(B) subject to subsection (h), made pursuant to a court order authorizing such disclosure, if the subscriber is notified of such order by the person to whom the order is directed; or

"(C) a disclosure of the names and addresses of subscribers to any cable service or other service, if—

"(i) the cable operator has provided the subscriber the opportunity to prohibit or limit such disclosure, and

"(ii) the disclosure does not reveal, directly or indirectly, the—

"(I) extent of any viewing or other use by the subscriber of a cable service or other service provided by the cable operator.

"(II) the nature of any transaction made by the subscriber over the cable system of the cable operator.

"(d) A cable subscriber shall be provided access to all personally identifiable information regarding that subscriber which is collected and maintained by a cable operator. Such information shall be made available to the subscriber at reasonable times and at a convenient place designated by such cable operator. A cable subscriber shall be provided reasonable opportunity to correct any error in such information.

"(e) A cable operator shall destroy personally identifiable information if the information is no longer necessary for the purpose for which it was collected and there are no pending requests or orders for access to such information under subsection (d) or pursuant to a court order.

"(f)(1) Any person aggrieved by any act of a cable operator in violation of this section may bring a civil action in a United States district court.

"(2) The court may award—

"(A) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

"(B) punitive damages; and

"(C) reasonable attorneys' fees and other litigation costs reasonably incurred.

"(3) The remedy provided by this section shall be in addition to any other lawful remedy available to a cable subscriber.

"(g) Nothing in this title shall be construed to prohibit any State or any franchising authority from enact-

ing or enforcing laws consistent with this section for the protection of subscriber privacy.

"(h) A governmental entity may obtain personally identifiable information concerning a cable subscriber pursuant to a court order only if, in the court proceeding relevant to such court order—

"(1) such entity offers clear and convincing evidence that the subject of the information is reasonably suspected of engaging in criminal activity and that the information sought would be material evidence in the case; and

"(2) the subject of the information is afforded the opportunity to appear and contest such entity's claim.

"CONSUMER PROTECTION

"SEC. 632. (a) A franchising authority may require, as part of a franchise (including a franchise renewal, subject to section 626), provisions for enforcement of—

"(1) customer service requirements of the cable operator; and

"(2) construction schedules and other construction-related requirements of the cable operator.

"(b) A franchising authority may enforce any provision, contained in any franchise, relating to requirements described in paragraph (1) or (2) of subsection (a), to the extent not inconsistent with this title.

"(c) Nothing in this title shall be construed to prohibit any State or any franchising authority for enacting or enforcing any consumer protection law, to the extent not inconsistent with this title.

"UNAUTHORIZD RECEPTION OF CABLE SERVICE

"SEC. 633. (a)(1) No person shall intercept or receive or assist in intercepting or receiving any communications

service offered over a cable system, unless specifically authorized to do so by a cable operator or as may otherwise be specifically authorized by law.

"(2) For the purpose of this section, the term 'assist in intercepting or receiving' shall include the manufacture or distributor (as the case may be) for unauthorized reception of any communications service offered over a cable system in violation of subparagraph (1).

"(b)(1) Any person who willfully violates subsection (a)(1) shall be fined not more than $1,000 or imprisoned for not more than 6 months, or both.

"(2) Any person who violates subsection (a)(1) willfully and for purposes of commercial advantage or private financial gain shall be fined not more than $25,000 or imprisoned for not more than 1 year, or both, for the first such offense and shall be finded not more than $50,000 or imprisoned for not more than 2 years, or both, for any subsequent offense.

"(c)(1) Any person aggrieved by any violation of subsection (a)(1) may bring a civil action in a United States district court or in any other court of competent jurisdiction.

"(2) The court may—

"(A) grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain violations of subsection (a)(1);

"(B) award damages as described in paragraph (3); and

"(C) direct the recovery of full costs, including awarding reasonable attorneys' fees to an aggrieved party who prevails.

"(3)(A) Damages awarded by any court under this section shall be computed in accordance with either of the following clauses:

"(i) the party aggrieved may recover the actual damages suffered by him as a result of the violation and any profits of the violator that are attributable to the violation which are not taken into account in computing the actual damages; in determining the violator's profits, the party aggrieved shall be required to prove only the violator's gross revenue, and the violator shall be required to prove his deductible expenses and the elements of profit attributable to factors other than the violation; or

"(ii) the party aggrieved may recover an award of statutory damages for all violations involved in the action, in a sum of not less than $250 or more than $10,000 as the court considers just.

"(B) In any case in which the court finds that the violation was committted willfully and for purposes of commercial advantage or private financial gain, the court in its discretion may increase the award of damages whether actual or statutory under subparagraph (A), by an amount of not more than $50,000.

"(C) In any case where the court finds that the violator was not aware and had no reason to believe that his acts constittued a violation of this section, the court in its discretion may reduce the award of damages to a sum of not less than $100.

"(D) Nothing in this title shall prevent any State or franchising authority from enacting or enforcing laws, consistent with this section, regarding the unauthorized interception or reception of any cable service or other communications service.

"EQUAL EMPLOYMENT OPPORTUNITY

"SEC. 634. (a) This section shall apply to any corporation, partnership, association, joint-stock company, or trust engaged primarily in the management or operation of any cable system.

"(b) Equal opportunity in employment shall be afforded by each entity specified in subsection (a), and no person shall be discriminated against in employment by such entity because of race, color, religion, national origin, age, or sex.

"c) Any entity specified in subsection (a) shall establish, maintain, and execute a positive continuing program of specific practices designed to ensure equal opportunity in every aspects of its employment policies and practices. Under the terms of its program, each such entity shall—

"(1) define the responsibility of each level of management to ensure a positive application and vigorous enforcement of its policy of equal opportunity, and establish a procedure to review and control managerial and supervisory performance;

"(2) inform its employees and recognized employee organizations of the equal employment opportunity policy and program and enlist their cooperation;

"(3) communicate its equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to race, color, religion, national origin, age, or sex, and solicit recruitment assistance on a continuing basis;

"(4) conduct a continuing program to exclude every form of prejudice or discrimination based on race, color, religion, national origin, age, or sex, from its personnel policies and practices and working conditions; and

"(5) conduct a continuing review of job structure and employment practices and adopt positive recruitment, training, job design, and other measures needed to ensure genuine equality of opportunity to participate fully in all its organizational units, occupations, and levels of responsibility.

"(d) (1) Not later than 270 days after the effective date of this section, and after notice and opportunity for hearing, the Commission shall prescribe rules to carry out this section.

"(2) Such rules shall specify the terms under which an entity specified in subsection (a) shall, to the extent possible—

"(A) disseminate its equal opportunity program to job applicants, employees, and those with whom it regularly does business;

"(B) use minority organizations, organizations for women, media, educational institutions, and other potential sources of minority and female applicants, to supply referrals whenever jobs are available in its operation;

"(C) evaluate its employment profit and job turnover against the availability of minorities and women in its franchise area;

"(D) undertake to offer promotions of minorities and women to positions of greater responsibility;

"(E) encourage minority and female entrepreneurs to conduct business with all parts of its operation; and

"(F) analyze the results of its efforts to recruit, hire, promote, and use the services of minorities and women and explain why difficulties encountered in implementing its equal employment opportunity program.

"(3) Such rules also shall require an entity specified in subsection (a) with more than 5 full-time employees to file with the Commission an annual statistical report identifying by race and sex the number of employees in

each of the following full-time and part-time job categories:

"(A) officials and managers;
"(B) professionals;
"(C) sales persons;
"(E) office and clerical personnel;
"(F) skilled craft persons;
"(G) semiskilled operatives;
"(H) unskilled laborers; and
"(I) service workers.

The report shall include the number of minorities and women in the relevant labor market for each of the above categories. The statistical report shall be available to the public at the central office and at every location where more than 5 full-time employees are regularly assigned to work.

"(4) The Commission may amend such rules from time to time to the extent necessary to carry out the provisions of this section. Any such amendment shall be made afer notice and opportunity for comment.

"(e)(1) On an annual basis, the Commission shall certify each entity described in subsection (a) as in compliance with this section if, on the basis of information in the possession of the Commission, including the report filed pursuant to subsection (d)(3), such entity was in compliance, during the annual period involved, with the requirements of subsections (b), (c), and (d).

"(2) The Commission shall, periodically but not less frequently than every five years, investigate the employment practices of each entity described in subsection (a), in the aggregate, as well as in individual job categories, and determine whether such entity is in compliance with the requirements of subsections (b), (c), and (d), including whether such entity's employment practices deny or abridge women and minorities equal employment op-

portunities. As part of such investigation, the Commission shall review whether the entity's reports filed pursuant to subsection (d)(3) acccurately reflect employee responsibilities in the reported job classifications.

"(f)(1) If the Commission finds after notice and hearing that the entity involved has willfully or repeatedly without good cause failed to comply with the requirements of this section, such failure shall constitute a substantial failure to comply with this title. The failure to obtain certification under subsection (e) shall not itself constitute the basis for a determination of substantial failure to comply with this title. For purposes of this paragraph, the term 'repeatedly', when used with respect to failures to comply, refers to 3 or more failures during any 7-year period.

"(2) Any person who is determined by the Commission, through an investigation pursuant to subsection (e) or otherwise, to have failed to meet or failed to make best efforts to meet the requirements of this section, or rules under this section, shall be liable to the United States for a forfeiture penalty of $200 for each violation. Each day of a continuing violation shall constitute a separate offense. Any entity defined in subsection (a) shall not be liable for more than 180 days of forfeitures which accrued prior to notification by the Commission of a potential violation. Nothing in this paragraph shall limit the forfeiture imposed on any person as a result of any violation that continues subsequent to such notification. In addition, any person liable for such penalty may also haveany license under this Act for cable auxiliary relay service suspended until the Commission determines that the failure involved has been corrected. Whoever knowingly makes any false statement or submits documentation which he knows to be false, pursuant to an application for certification under this section shall be in violation of this section.

"(3) The provisions of paragraphs (3) and (4), and the last 2 sentences of paragraph (2), of section 503(b) shall apply to forfeitures under this subsection.

"(4) The Commission shall provide for notice to the public and appropriate franchising authorities of any penalty imposed under this section.

"(g) Employees or applicants for employment who believe they have been discriminated against in violation of the requirements of this section, or rules under this section, or any other interested person, may file a complaint with the Commission. A complaint by any such person shall be in writing, and shall be signed and sworn to by that person. The regulations under subsection (d)(1) shall specify a program, under authorities otherwise available to the Commisison, for the investigation of complaints and violations, and for the enforcement of this section.

"(h)(1) For purposes of this section, the term 'cable operator' includes any operator of any satellite master antenna system, including a system described in section 602(6)(A).

"(2) Such term does not include any operator of a system which, in theaggregate, serves fewer than 50 subscribers.

"(3) In any case in which a cable operator is the owner of a multiple unit dwelling, the requirements of this section shall only apply to such cable operator with respect to its employees who are primarily engaged in cable telecommunications.

"(i)(1) Nothing in this section shall affect the authority of any State or any franchising authority—

> "(A) to establish or enforce any requirement which is consistent with the requirements of this section, including any requirement which affords equal employment opportunity protection for employees;

"(B) to establish or enforce any provision requiring or encouraging any cable operator to conduct business with enterprises which are owned or controlled by members of minority groups (as defined in section 309(i)(3)(C)(ii)) or which have their principal operations located within the community served by the cable operator, or

"(C) to enforce any requirement of a franchise in effect on the effective date of this title.

"(2) The remedies and enforcement provisions of this section are in addition to, and not in lieu of, those available under this or any other law.

"(3) The provisions of this section shall apply to any cable operator, whether operating pursuant to a franchise granted before, on, or after the date of the enactment of this section.

"JUDICIAL PROCEEDINGS

"SEC. 635. (a) Any cable operator adversely affected by any final determination made by a franchising authority under section 625 or 626 may commence an action within 120 days after receiving notice of such determination, which may be brought in—

"(1) the district court of the United States for any judicial district in which the cable system is located; or

"(2) in any State court of general jurisdiction having jurisdiction over the parties.

"(b) The court may award any appropriate relief consistent with the provisions of the relevant section described in subsection (a).

"COORDINATION OF FEDERAL, STATE, AND LOCAL AUTHORITY

"SEC. 636. (a) Nothing in this title shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding

matters of public health, safety, and welfare, to the extent consistent with the express provisions of this title.

"(b) Nothing in this title shall be construed to restrict a State from exercising jurisdiction with regard to cable services consistent with this title.

"(c) Except as provided in section 637, any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded.

"(d) For purposes of this section, the term 'State' has the meaning given such term in section 3(v).

"EXISTING FRANCHISES

"SEC. 637.—(a) The provisions of—

"(1) any franchise in effect on the effective date of this title, including any such provisions which relate to the designation, use, or support for the use of channel capacity for public, educational, or governmental use, and

"(2) any law of any State (as defined in section 3(v)) in effect on the date of the enactment of this section, or any regulation promulgated pursuant to such law, which relates to such designation, use or support of such channel capacity.

shall remain in effect, subject to the express provisions of this title, and for not longer than the then current remaining term of the franchise as such franchise existed on such effective date.

"(b) For purposes of subsection (a) and other provisions of this title, a franchise shall be considered in effect on the effective date of this title if such franchise was granted on or before such effective date.

"CRIMINAL AND CIVIL LIABILITY

"SEC. 638. Nothing in this title shall be deemed to affect the criminal or civil liability of cable programmers or cable operators pursuant to the Federal, State, or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws, except that cable operators shall not incur any such liability for any program carried on any channel designated for public, educational, governmental use or on any other channel obtained under section 612 or under similar arrangements.

"OBSCENE PROGRAMMING

"SEC. 639. Whoever transmits over any cable system any matter which is obscen or otherwise unprotected by the Constitution of the United States shall be fined not more than $10,000 or imprisoned not more than 2 years, or both.".

JURISDICTION

SEC. 3. (a)(1) Section 2(a) of the Communications Act of 1934 is amended by adding at the end thereof the following: "The provisions of this Act shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in title VI.".

(2) Section 2(b) of such Act is amended by inserting after "section 301" the following: "and title VI".

(b) The provisions of this Act and amendments made by this Act shall not be construed to affect any jurisdiction the Federal Communications Commission may have under the Communications Act of 1934 with respect to any communication by wire or radio (other than cable service, as defined in section 602(5) of such Act) which is provided through a cable system, or persons or facilities engaged in such communications.

POLE ATTACHMENTS

SEC. 4. Section 224(c) of the Communications Act of 1934 is amended by adding at the end thereof the following new paragraph:

"(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments—

"(A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and

"(B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter—

"(i) within 180 days after the complaint is filed with the State, or

"(ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.".

UNAUTHORIZED RECEPTION OF CERTAIN COMMUNICATIONS

SEC. 5. (a) Section 705 of the Communications Act of 1934 (as redesignated by section 6) is amended by inserting "(a)" after the section designation and by adding at the end thereof the following new subsections:

"(b) The provisions of subsection (a) shall not apply to the interception or receipt by any individual, or the assessing (including the manufacture or sale) of such interception or receipt, of any satellite cable programming for private viewing if—

"(1) the programming involved is not encrypted; and

"(2)(A) a marketing system is not established under which—

"(i) an agent or agents have been lawfully designated for the purpose of authorizing private viewing by individuals, and

"(ii) such authorization is available to the individual involved from the appropriate agent or agents; or

"(B) a marketing system described in subparagraph (A) is established and the individuals receiving such programming has obtained authorization for private viewing under that system.

"(C) For purposes of this section—

"(1) the term 'satellite cable programming' means video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers;

"(2) the term 'agent', with respect to any person, includes an employee of such person;

"(3) the term 'encrypt', when used with respect to satellite cable programming, means to transmit such programming in a form whereby the aural and visual characteristics (or both) are modified or altered for the purpose of preventing the unauthorized receipt of such programming by persons without authorized equipment which is designed to eliminate the effects of such modification or alteration;

"(4) the term 'private viewing' means the viewing for private use in an individual's dwelling unit by means of equipment, owned or operated by such individual, capable of receiving satellite cable programming directly from a satellite; and

"(5) the term 'private financial gain' shall not include the gain resulting to any individual for the private use in such individual's dwelling unit of any programming for which the individual has not obtained authorization for that use.

"(d) (1) Any person who willfully violates subsection (a) shall be fined not more than $1,000 or imprisoned for more than 6 months, or both.

"(2) Any person who violates subsection (a) willfully and for purposes of direct or indirect commercial advantage or private financial gain shall be fined not more than $25,000 or imprisoned for not more than 1 year, or both, for the first such conviction and shall be fined not more than $50,000 or imprisoned for not more than 2 years, or both, for any subsequent conviction.

"(3) (A) Any person aggrieved by any violation of subsection (a) may bring a civil action in a United States district court or in any other court of competent jurisdiction.

"(B) The court may—

"(i) grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain violations of subsection (a);

"(ii) award damages as described in subparagraph (C); and

"(iii) direct the recovery of full costs, including awarding reasonable attorneys' fees to an aggrieved party who prevails.

"(C) (i) Damages awarded by any court under this section shall be computed, at the election of the aggrieved party, in accordance with either of the following subclauses;

"(I) the party aggrieved may recover the actual damages suffered by him as a result of the violation

and any profits of the violator that are attributable to the violation which are not taken into account in computing the actual damages; in determining the violator's profits, the party aggrieved shall be required to prove only the violator's gross revenue, and the violator shall be required to prove his deductible expenses and the elements of profit attributable to factors other than the violation; or

"(II) the party aggrived may recover an award of statutory damages for each violation involved in the action in a sum of not less than $250 or more than $10,000, as the court considers just.

"(ii) In any case in which the court finds that the violation was committed wulfully and for purposes of direct or indirect commercial advantage or private financial gain, the court in its discretion may increase the award of damages, whether actual or statutory, by an amount of not more than $50,000.

"(iii) In any case where the court finds that the violator was not aware and had no reason to believe that his acts constituted a violation of this section, the court in its discretion may reduce the award of damages to a sum of not less than $100.

"(4) The importation, manufacture, sale, or distribution of equipment by any person with the intent of its use to assist in any activity prohibited by subsection (a) shall be subject to penalties and remedies under this subsection to the same extent and in the same manner as a person who has engaged in such prohibited activity.

"(5) The penalties under this subsection shall be in addition to those prescribed under any other provision of this title.

"(6) Nothing in this subsection shall prevent any State, or political subdivision thereof, from enacting or enforcing any laws with respect to the importation, sale, manu-

facture, or distribution of equipment by any person with the intent of its use to assist in the interception or receipt of radio communications prohibited by subsection (a).

"(e) Nothing in this section shall affect any right, obligation, or liablity under title 17, United States Code, any rule, regulation, or order thereunder, or any other applicable Federal, State, or local law.".

(b) The amendments made by subsection (a) shall take effect on the effective date of this Act.

TECHNICAL AND CONFORMING AMENDMENTS

SEC. 6. (a) Title VI of the Communications Act of 1934 (as in effect before the enactment of this Act) is redesignated as title VII, and sections 601 through 610 are redesignated as sections 701 thruogh 710, respectively.

(b)(1) Section 309(h) of the Communications Act of 1934 is amended by striking out "section 606" and inserting in lieu thereof "section 706".

(2) Section 2511 of title 18, United States Code, is amended—

(A) in subsection (2)(e), by striking out "section 605 or 606" and inserting in lieu thereof "section 705 or section 706"; and

(B) in subsection (2)(f), by striking out "section 605" and inserting in lieu thereof "section 705".

(3) Section 105(f)(2)(C) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1805(f)(2)(C) is amended by striking out "section 605" and inserting in lieu thereof section 705".

SUPPORT OF ACTIVITIES OF THE UNITED STATES TELECOMMNICATIONS TRAINING INSTITUTE

SEC. 7. Nothing in this Act, the Communications Act of 1934, or any other Act shall be construed to preclude the Federal Communications Commission or the National Tele-

communications and Information administration within the Department of Commerce from participation (including use of staff and other appropriate resources) in support of any activities of the United States Telecommunications Training Institute.

TELECOMMUNICATIONS POLICY STUDY COMMISSION

SEC. 8. Title VII of the Communications Act of 1934 (as redesignated by section 6 of this Act) is amended by adding at the end thereof the following new section:

"TELECOMMUNICATIONS POLICY STUDY COMMISSION

"SEC. 711. (a) There is hereby established the Telecommunications Policy Study Commission (hereinafter in this section referred to as the 'Commission') which shall—

"(1) compare various domestic telecommunications policies of the United States and other nations, including the impact of all such policies on the regulation of interstate and foreign commerce, and

"(2) prepare and transmit a written report thereon to the Congress, the President, and the Federal Communications Commission.

"(b)(1) Such Commission shall be composed of the chairman and ranking minority members of the Committee on Commerce, Science, and Transportation and the Communications Subcommittee of the Senate and the Committee on Energy and Commerce and the Telecommunications, Consumer Protection and Finance Subcommittee of the House of Representatives (or delegates of such chairmen or members appointed by them from among members of such committees).

"(2) The chairmen of such committees (or their delegates) shall be co-chairmen of the Commission.

"(c)(1) The report under subsection (a)(2) shall be submitted not later than December 1, 1987. Such report

shall contain the results of all Commission studies and investigations under this section.

"(2) The Commission shall cease to exist—

"(A) on December 1, 1987, if the report is not submitted in accordance with paragraph (1) on the date specified therein; or

"(B) on such date (but not later than May 1, 1988) as may be determined by the Commission, by order, if the report is submitted in accordance with paragraph (1) on the date specified in such paragraph.

"(d)(1) The members of the Commission who are not officers or employees of the United States, while attending conferences or meetings of the Commission or while otherwise serving at the request of the chairmen, shall be entitled to receive compensation at a rate not in excess of the maximum rate of pay for Grade GS-18, as provided in the General Schedule under section 5332 of title 5 of the United States Code, including traveltime, and while away from their homes or regular places of business, they may be allowed travel expenses, including per diem in lieu of subsistence as authorized by law (5 U.S.C. 5703) for persons in the Government service employed intermittently.

"(2) The Commission may appoint and fix the pay of such staff as it deems necessary.

"(e)(1) In conducting its activities, the Commission may enter into contracts to the extent it deems necessary to carry out its responsibilities, including contracts with nongovernmental entities that are competent to perform research or investigations in reas within the Commission's responsibilities.

"(2) The Commission is authorized to hold public hearings, forums, and other meetings to enable full public participation.

"(f) The heads of the departments, agencies, and instrumentalities of the executive branch of the Federal Government shall cooperate with the Commission in carrying out this section and shall furnish to the Commission such information as the Commission deems necessary to carry out this section, in accordance with otherwise applicable law.

"(g) There are authorized to be appropriated such sums as may be appropriated to carry out this section for a period of three fiscal years.

"(h) Activities authorized by this section may be carried out only with funds and to the extent approved in appropriation Acts.

"(i) Nothing in this section shall be construed to affect any proceedings by, or activities of, the Federal Communications Commission, except that the Federal Communications Commission shall consider submissions by the Commission submitted pursuant to subsection (a)(2).".

EFFECTIVE DATE

SEC. 9. (a) Except where otherwise expressly provided, the provisions of this Act and the amendments made thereby shall take effect 60 days after the date of enactment of this Act.

(b) Nothing in section 623 or 624 of the Communications Act of 1934, as added by this Act, shall be construed to allow a franchising authority, or a State or any political subdivision of a State, to require a cable operator to restore, retier, or reprice any cable service which was lawfully eliminated, retiered, or repriced as of September 26, 1984.

Approved October 30, 1984.

Chapter 13. Cable Television Systems

SECTION

501. Definitions.
502. Jurisdiction.
503. Certification.
504. Jurisdiction; general scope.
505. Service.
506. [Repealed.]
507. [Repealed.]
508. Unauthorized operation; penalty.

§ 501. Definitions

As used in this chapter:

(1) "Board" shall mean the public service board.

(2) "Cable television system" means a system by which television signals are received from one or more central locations and for consideration are transmitted to customers or subscribers by means of cable or wires.

(3) "Company" or "companies" means persons, partnerships, associations, corporations, owning or operating a cable television system.—Added 1969, No. 167 (Adj. Sess.), § 1, eff. Feb. 10, 1970.

§ 502. Jurisdiction

The board and the department of public service shall have general supervision over any company within the state owning, operating or providing a cable television system.—Added 1969, No. 167 (Adj. Sess.), § 1, eff. Feb. 10, 1970; amended 1979, No. 204 (Adj. Sess.), § 32, eff. Feb. 1, 1981.

§ 503. Certification

(a) No company may own or operate a cable television system unless it holds a license which shall be issued annually under rules and regulations prescribed by the board

and a certificate of public good issued by the board authorizing it to do so. However, the board shall, without requiring proof that the business will promote the general good of the state, issue a certificate to any company which, or whose predecessor:

(1) On February 10, 1970, owned or operated a cable television system within the area for which application is made, and continued thereafter to do so; and

(2) Files an application with the public service board for a certificate of public good within ninety days after February 10, 1970. Pending the determination of the application, the continued ownership or operation of the cable television service shall be lawful.

(b) In all other cases, the board shall hear and determine applications in accordance with the procedures set forth in sections 102 and 231 of this title.

(c) Application for a certificate of public good shall be made in writing to the board and shall contain the names of the owners or incorporators of the company, a description of the territory proposed to be served, a statement as to the proposed financing for the company, and such other information as the board by rule requires.—Added 1969, No. 167 (Adj. Sess.), § 1, eff. Feb. 10, 1970.

§ 504. Jurisdiction; general scope

A company subject to supervision under this chapter shall have the privileges provided in and be subject to the provisions of chapters 1 through 7 of this title.—Added 1969, No. 167 (Adj. Sess.), § 1, eff. Feb. 10, 1970.

§ 505. Service

No company holding a certificate of public good under this chapter may abandon or curtail any service subject to the jurisdiction of the board or abandon all

or any part of its facilities it would thereby effect the abandonment, curtailment or impairment of the service, without obtaining approval of the public service board, after notice and hearing, and upon a finding by the board that the abandonment or curtailment is consistent with the public interest.—Added 1969, No. 167 (Adj. Sess.), § 1, eff. Feb. 10, 1970.

§ 506. Repealed. 1971, No. 202 (Adj. Sess.), § 3, eff. May 1, 1972.

§ 507. Repealed. 1973, No. 147 (Adj. Sess.), § 3.

§ 508. Unauthorized operation; penalty

A person or company rendering service which is subject to the jurisdiction of the public service board under this chapter, without being duly licensed by the public service board for that purpose under this chapter, may be fined note more than $1,000.00.—Added 1971, No. 202 (Adj. Sess.), § 2, eff. May 1, 1972.

POWERS OF CITY COUNCIL

Sec. 48. [Enumerated.]

The city council shall have power:

I. To establish and regulate a market, and to regulate, license, tax or prohibit the selling or peddling of meat, fish, or other provisions on foot or from vehicles about the city, except that the city council shall not have power to license, tax, or prohibit farmers selling the produce of their own farm.

II. To restrain and prohibit all descriptions of gaming, to order the destruction of all instruments and devices used for that purpose, and to license or tax any such devices or instruments the usage of which is now, or may hereafter be, permissible under the laws of the state, and to license or tax any mechanical or electrical amusement devices or the places wherein the same may be located.

III. To regulate, license, tax or prohibit the exhibition of common showmen, circuses, menageries, carnivals, and shows of every kind, and all plays, athletic contests, exhibitions or entertainments for money, including the power to tax admissions to the same except such as may be conducted by educational or nonprofit institutions or organizations or wholly for charitable purposes; to provide a system of examination, approval and regulation of motion picture films, reels or stereopticon views or slides and of banners, posters and other like advertising matter used in connection therewith; to create and establish a board of censors to administer such system within the limits of said city and to define and prescribe their duties and powers and to regulate, restrict or prevent attendance of minors at exhibitions of films, reels or stereopticon views.

IV. To regulate, license, tax, or prohibit itinerant vendors, peddlers, street musicians, transient auctioneers

and itinerant photographers; provided the city council shal not have the power to license, tax or prohibit farmers selling the produce of their own farm.

XXXVIII. To provide for assessing owners of land and buildings thereon abutting any street, alley or lane in said city such sum as said land and buildings shall be benefited by raising or lowering the surface of said street or highway; and also to award such damages to such owners as they shall suffer in consequence of raising or lowering the surface of said street or highway as aforesaid.

The same proceedings shall be had in respect to said award of damages and assessment, as are herein provided in case the owners of lands are dissatisfied with the award of damages or amount of assessment in laying out or altering streets or highways; and said assessment shall be a lien in the nature of a tax on the lands and buildings so assessed, and may be collected or enforced in the same manner herein provided for assessments made in laying out, altering or resurveying any street or highway in said city.

XXXIX. To provide for indexing any part or all of the records of deeds and of any or all public records of said City of Burlington, and like records of the former Town of Burlington, by the "card index," so-called, or any other like system. Such "card index" or other like system may be employed in addition to or in lieu of the manner of indexing now required by the laws of this state.

XL. To fix, demand, impose and enforce such terms, conditions and regulations for the use or occupation of any street or highway in said city by any street railroad, traction, telegraph, telephone, electric, gas, electric lighting, electric power, or other company or any person enjoying the privileges, or exercising the functions of any such company aforesaid, as shall be just and reason-

able, including any sum or sums of money to be paid to said city for the use of any street or highway by any or all of said companies for the purpose of laying, maintaining and operating any street railway therein, or for the purpose of therein erecting and maintaining any poles, wires or any other apparatus in or under the surface of said tsreet; and to prohibit the use of such street by any such company or person until such terms have been complied with.

In case any such company or person cannot agree with said city upon such terms, said company or person may apply by petition to the county court within and for the County of Chittenden, and said court shall thereupon, after hearing all parties interested therein, fix such terms as shall be just and reasonable and make all necessary orders for carrying its decision therein into effect.

Provided, however, that no special franchise shall be granted by said city council for a longer term than thirty years, and further provided that at the expiration of any franchise, or at any time thereafter, the city shall have the right to acquire the title to and take over the property employed or used in the business for which such franchise was granted, upon the payment to the owner of the same of the fair value of the physical properties at that time employed or used in such business, and that in case the city is unable to agree with the owners as to the value of such physical properties, then said property may be condemned and taken for public use, and the value thereof ascertained and awarded as compensation therefor to the owner of the same in the manner, as near as may be, provided in the general laws of the state for the determination of the damages to be awarded persons aggrieved or damaged by the construction or operation of a street railway, and further provided that the grant of every such special franchise shall

contain provisions embodying the foregoing conditions and limitations.

XLI. To prescribe the duties of the inspector of electrical wiring apparatus and the installation and maintenance thereof; to regulate and require licenses for all persons engaged in the business or trade of selling electrical apparatus and supplies and in the business or trade of installing and repairing electrical wiring and apparatus but not including telephone or telegraph wire or apparatus, and to regulate and require licenses for all persons engaged in the business or trade of plumbing or house drainage within the limits of said city and to fix and impose the terms, conditions and fees for all such licenses. (Referendum of March 7, 1978)

Supreme Court, U.S.
FILED
JUN 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1816

In The

Supreme Court of the United States

October Term, 1988

CITY OF BURLINGTON, VERMONT,

Petitioner,

v.

MOUNTAIN CABLE COMPANY,

Respondent.

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Mountain Cable Company ("Mountain")[1] entered into an agreement in June of 1985 (the "Agreement") with the City of Burlington, Vermont ("City"). The Agreement was entered into in settlement of disputes between Mountain and the City. The City agreed to waive its claimed franchise right to establish a municipal cable system to serve Burlington and to dismiss an action seeking street excavation fees from Mountain in consideration for the payment of $1,000,000 and certain other undertakings by Mountain. Mountain agreed to pay a franchise fee of five percent of gross revenues derived within the City from the operation of the cable television system commencing after July 1, 1991.

The rate regulating provisions of ¶ 4.03 of the Agreement comprise one of Mountain's other undertakings. Mountain has increased its rates for basic cable service in a manner it believes to be consistent with the Agreement. The City chose to dispute the propriety of the initial rate

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[1] Per Rule 28.1, Mountain makes this disclosure: Mountain Cable Company ("MCC") is a Vermont limited partnership whose managing general partner is Pericles Communication Corporation ("Pericles"). Pericles is also the limited partner of MCC. In addition, there are two other general partners: Mountain Cable Communications Corporation, which is a Delaware corporation wholly-owned by Pericles, and Mr. Robert F. McGill, a natural person residing in Charlotte, Vermont. Chelsea Communication Corporation ("Chelsea") owns one hundred percent of Pericles. Adelphia Communications Corporation owns one hundred percent of Chelsea. Chelsea also has a controlling interest in numerous other cable television systems.

increase by commencing an action in the Vermont Superior Court.[2] Mountain did not argue that ¶ 4.03 of the Agreement was preempted by the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.* (the "Cable Act"), but the trial court raised the issue and its ruling that the rate regulating provisions are preempted by the Act was upheld by the Vermont Supreme Court.[3]

The Vermont Supreme Court held that the Cable Act prohibits the City, as a political subdivision of the State, from regulating rates charged by Mountain for basic cable service. Petitioner's App. at 5a. The Vermont Supreme Court, in *dicta*, went on to state its view that the City also constitutes a "franchising authority" within the definition of 47 U.S.C. § 522 and is subject to the Cable Act for that reason as well. Petitioner's App. at 6a.

The issue of waiver of statutory rights was first raised by the City in correspondence supplementing its brief to the Vermont Supreme Court, citing *Erie Telecommunications, Inc. v. City of Erie*, 659 F. Supp. 580 (W.D. Pa. 1987), *aff'd on other grounds*, 853 F.2d 1084 (3d Cir. 1988). The City's Motion for Reargument to the Vermont Supreme Court makes the waiver argument in more

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[2] *City of Burlington v. Mountain Cable Company*, State of Vermont Superior Court, Chittenden County, Docket No. S1190-86CnC.

[3] *City of Burlington v. Mountain Cable Company*, No. 87-156 (Vt. S. Ct., Nov. 10, 1988). Petitioner's App. at 8a. Though Mountain has felt constrained to argue that any portion of the Agreement lacks validity, it opposes the City's Petition in order to promote finality to this litigation. The rates in controversy went into effect January 1, 1987, and Mountain's current billing practices are predicated on its belief that the rates are legal.

detail. Petitioner's App. at 10a. The Vermont Supreme Court did not specifically address the waiver issue in denying reargument. It simply stated that the City had failed to identify any points of law or fact previously overlooked or misapprehended. Petitioner's App. at 19a.

SUMMARY OF ARGUMENT

This Court should not grant certiorari because the issues Petitioner raises are not based on the holding of the Vermont Supreme Court. Only in *dictum* did the Court below say the City is a "franchising authority" under the Cable Act. The Court did not expressly hold that the rate deregulation provisions of the Act cannot be waived. Thus, the points of law the Petitioner wants clarified are not squarely presented by this case.

Even if the "franchising authority" issue was presented by this case, it does not raise an important federal question. Only a few states have regulatory schemes resembling Vermont's, and because of the City's unique Charter a decision by this Court might have no impact beyond Burlington, Vermont. Petitioner is unable to cite any authority holding that municipalities in its position are not "franchising authorities."

The only rulings on Cable Act rate deregulation hold it non-waivable. The *Erie* case cited by the City is inapposite. It doesn't involve the rate regulating provisions of the Cable Act, its factual setting varies significantly from the case at bar and its holding does not turn on the question of statutory waiver.

ARGUMENT

I. Certiorari Should Not Be Granted to Decide Whether Municipalities In Vermont Are "Franchising Authorities" Under the Cable Act Because That Is Neither the Holding of the Court Below Nor an Important Federal Question.

The City first contends that it is not a "franchising authority" under the Cable Act. The City's contention does not present an important federal question warranting resolution by this Court for two reasons. First, the Vermont Supreme Court's holding was not based on a finding that the City is a franchising authority. Instead, the court below held that the City is a "political subdivision" forbidden from regulating cable rates under the Act. Overturning the Vermont Supreme Court's *dictum* on franchising authorities would not alter the result below. Second, the determination of what constitutes a franchising authority depends on the particular facts and circumstances of each case. Whether the City is a franchising authority turns, in part, on its unique Charter. A ruling on that issue in this case would have extremely limited applicability to other states, and possibly even no applicability to other municipalities in Vermont.

A. The court below held that the City is a "political subdivision" subject to the Cable Act.

The City misstates the Vermont Supreme Court's holding when it claims that the Court held the City to be a "franchising authority" under the Cable Act. Section 543(a) of the Act provides in pertinent part: "Any Federal agency or State may not regulate the rates for the provision of cable service except to the extent provided under

this section." 47 U.S.C. § 543(a). After quoting this section, the Vermont Supreme Court found that:

> A "State" under the Act "means any State, or political subdivision, or agency thereof." 47 U.S.C. § 522(15). The City is such a subdivision and may not regulate except as authorized by the Act. The exceptions are limited and it is not claimed that any apply to the facts of this case.
>
> The City's argument that the Act prohibits only "franchising authorities" from rate regulation overlooks the plain language of the Act, which prohibits rate regulation by a political subdivision. The language in the disputed paragraph of the contract regulates the rates which Mountain may charge during the term of the contract.

Petitioner's App. at 5a.[4] This determination standing alone supports the Vermont Supreme Court's decision.

The Vermont Supreme Court then went on to find, in *dictum*, that the City constitutes a franchising authority and, for that additional reason, is also subject to the rate deregulating provisions of 47 U.S.C. § 543. The Court noted that "[e]ven if we were to accept the City's argument that the Act forbids rate regulation only by franchising authorities, the result would not change." Petitioner's App. at 6a. Thus, the Vermont Supreme Court based its decision that the City cannot regulate cable rates on the unequivocal language of 47 U.S.C. § 543(a) prohibiting rate regulation by any political subdivision, whether or not the City is a franchising authority.

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[4] The trial court based its denial of the City's motion to enjoin the subject rate increase on the same analysis. Petitioner's App. at 27a.

There is no need for this Court to determine whether a municipality in Vermont is a "franchising authority" for purposes of the Cable Act.

B. A ruling under the facts of this case would have very limited applicability.

Even if the City were correct in its characterization of the Vermont Supreme Court's holding, a decision by this Court on whether the City is a "franchising authority" under the Cable Act would have an extremely narrow impact. Thus, an important federal question is not presented here.

The City argues that the "franchising authority" issue is crucial in "states such as Vermont when grant of service territories . . . " and other franchising powers are vested in a state agency. In these states, the City contends that municipalities are not franchising authorities under the Cable Act. However, nowhere in the body of its argument does the City develop this point or tell this Court how many other states are like Vermont. In fact, there are only a handful.[5] Even then, because there are significant differences in those states' regulatory

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[5] Connecticut (Ch. 289, Conn. Gen. Stat. § 16-331 *et seq.*), Rhode Island (R.I. Gen. Laws Ch. 19, § 39-19-8), Alaska (A.L. Stat. § 42.05.010 *et seq.*), and Hawaii (Haw. Revised Stat. Ch. 440(G)). Respondent has only been able to locate three states, Massachusetts, New Jersey and New York, where some cable regulatory powers reside in a state agency, but in all of these states the power to "grant . . . service territories" rests with the municipalities in the first instance. See MGL, Ch. 166A, §§ 1-20; New Jersey Statutes Annotated, Title 48:5A-3; and N.Y.CLS Exec. at § 811 *et seq.*

schemes, there may well be different decisions on the franchising authority issue in each state.

Moreover, there may even be differences among communities in a state like Vermont. The City argues that the Vermont Public Service Board has the sole authority to issue cable television franchises in the state. But the City's Charter arguably gives it the power to regulate a cable television company's use of its streets. Petitioner's App. at 87a-89a. Section 522(9) of the Act defines a "franchising authority" as "any governmental entity empowered by Federal, State, or local law to grant a franchise." 1984 U.S. Code Cong. & Ad. News at 4682. And Section 522(8) defines a "franchise" as an "authorization . . . whether such authorization is designated as a franchise, permit, license, or resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system." The Vermont Supreme Court stated:

> In the legislative history, it was noted that in several states the franchising process includes approval by a State agency as well as local government. It was intended in such cases that the term "franchising authority" would include the State agencies as well as "any local government body with authority to grant a franchise. . . ." 1984 U.S. Code & Admin. News, at 4682. The City's charter empowers it to grant franchises for the use of its streets by a cable company and to charge fees for the erection and maintenance of poles and wires in or under its streets. See 1949, No. 298, § 48.

Petitioner's App. at 7a. The charter in another town in Vermont[6] might be different and so, too, the result of a

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[6] Indeed, many Vermont municipalities have no charter issued by the State of Vermont.

"franchising authority" determination. Thus, because the determination of a "franchising authority" not only requires legal but also significant factual findings based on the definitions in the Cable Act, the issue is so particular that a holding by this Court as to Burlington might not even apply to all of Vermont.

Respondent therefore submits that the issue posed by Petitioner is not raised by the holding below nor is it an important federal question. To the contrary, it is an issue of great particularity which must be decided according to the facts of each case.

II. Certiorari Should Be Denied Because Federal and State Courts Uniformly Have Held that the Protections of the Cable Act against Rate Regulation Cannot Be Waived by a Cable Television Operator.

Only two courts have expressly decided whether the protections of the Cable Act against rate regulation can be waived by a cable television operator in an agreement with a political subdivision.[7] Both of these courts held that those protections cannot be waived by the operator. *City of Dubuque v. Group W Cable, Inc.*, No. C 85-1046, slip op. at 4-6 (N.D. Iowa June 18, 1986) (1986 WESTLAW 15646) ("The general rule appears to be that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy . . . By the very

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[7] The City may argue that the Vermont Supreme Court held this *sub silentio* by denying the motion for reargument, but there is no other indication that waiver was considered in this case.

language of the Act it is clear that Congress intended to pre-empt local franchises and create a uniform national policy. To now uphold waivers of that national policy would directly contravene the intent of Congress."); *Nashoba Communications Limited Partnership No. 7, d/b/a Nashoba Cable Services v. Town of Danvers*, No. 88-1743-C (D. Mass. Dec. 30, 1988), *appeal docketed*, No. 89-1338 (1st Cir. April 11, 1989); *see also Report and Order* in MM Docket No. 84-1296, 58 RR 2d 1 (1985) at n. 91 (where the Federal Communications Commission noted "that neither a cable operator nor a franchising authority may waive mandatory sections of the Cable Act in reaching franchise agreements").

Neither these decisions nor the Vermont Supreme Court's opinion below are in direct conflict with *Erie Telecommunications, Inc. v. City of Erie*, 659 F.Supp. 580 (W.D.Pa. 1987), *aff'd on other grounds*, 853 F.2d 1084 (3d Cir. 1988). The issue in *Erie* was not whether a cable television operator could waive the rate regulation prohibition of Section 543 of the Cable Act, but whether a cable television operator, which had been awarded the City's franchise, could initiate an attack on its agreement by relying on the franchise fee limitations contained in a Federal Communications Commission regulation predating the Cable Act (47 C.F.R. § 76.31 (1980)) and in Section 542 of the Cable Act. The protections of rate deregulation under Section 543 of the Cable Act were not even discussed in the *Erie* case.

In *Erie* the cable television operator brought suit to attack the legality of the franchise fee provision in its contract, whereas in the case at bar the City brought suit

against Mountain to enforce the rate regulating provision in the Agreement. The Vermont Supreme Court weighed the purpose of the Cable Act in the context of a request to enforce the rate regulating provision. Thus it stated:

> The legislative history and the language of the Act evidence the declared policy of Congress to prohibit local governments from regulating basic cable rates after two years from the effective date of the Act. Refusal to enforce an agreement permitting rate regulation is consistent with and essential to effectuate this policy. Enforcement would offend one of the essential purposes of the Act. See *United States v. Mississippi Valley Co.*, 364 U.S. 520, 563 (1961). A term of an agreement is unenforceable if the interest in its enforcement is clearly outweighed by a public policy against the enforcement. See *id.* Here, the stated policy is clear and unequivocal and the enforcement of the contract provision would undermine and detract from that policy.

Petitioner's App. at 6a. In other words, *Erie* may prevent a cable operator from attacking its contractual obligation to pay a franchise fee, but it is a far different matter to hold that parties can contractually bind others to negate a statutory prohibition.

The district court in *Erie* never reached the issue of whether a statutory protection could be waived because it held that the plaintiff's long delay in asserting its rights estopped it, as a matter of law, from even making its claim that the franchise agreement violated its statutory rights. 659 F. Supp. at 587-588. In affirming the decision of the district court, the court of appeals never reached

the statutory waiver issue either.[8] The validity of a Cable Act waiver, therefore, was not a ground for the court of appeals decision.

The court of appeals did, however, discuss the plaintiff's waiver of its constitutional rights. After analysis of the case law, the court of appeals concluded that constitutional rights can be waived if the particular facts and circumstances demonstrate that the waiving party clearly understands what it is doing. 853 F.2d at 1096. The City argues that, if a constitutional right can be waived, then a statutory provision can also be waived. The defect in this argument is twofold. First, a constitutional right runs to a person, whereas a statutory provision, such as the one at bar, runs to the public as a whole. Thus, a person may be able to waive the former (*e.g.*, the right to counsel), but he may not be able to waive the latter (*e.g.*, pollution restrictions). Second, even if a person could waive a particular statutory provision which benefits him, his waiver cannot bind parties not privy to the contract. This is precisely the context in which Mountain's alleged waiver arises. Whatever the nature of Mountain's agreement with the City, the Vermont Supreme Court was obligated to apply the Cable Act. This, of course, was not the situation in *Erie*. Hence, there is no real conflict of authority to be resolved by the exercise of this Court's discretionary jurisdiction.

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[8] It can be argued that the plaintiff's Cable Act claims regarding the franchise fee were not even at issue. Part V of the decision reserves plaintiff's right to renew its claim that the franchise fee exceeds the "mandatory ceiling on franchise fee charges" when the franchise term ends. 853 F.2d at 1103.

CONCLUSION

Petitioner would have this Court decide whether municipalities in Vermont are "franchising authorities" within § 522(9) of the Cable Act, thus subject to the rate deregulating provisions of § 543 of the Act. But the Vermont Supreme Court did not hold that the City is a "franchising authority." The City was found to be subject to § 543 because it is a "political subdivision" of the "State" within §§ 522(15) and 543 of the Cable Act. A ruling on the franchising authority issue would have very limited applicability to other states and municipalities.

Petitioner also assigns error to the Vermont Supreme Court in not finding that Mountain waived rate deregulation under the Cable Act. The Court did not expressly hold that to be the case. Its implied ruling that rate deregulation under § 543(a) of the Act cannot be waived is consistent with the few cases passing on this issue.

The Petition for a Writ of Certiorari to the Vermont Supreme Court should be denied.

Respectfully submitted,

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